# THE CONVEYANCER
AND
# PROPERTY LAWYER

VOL. 3, No. 3. MARCH, 1939


## CONVEYANCER'S NOTEBOOK.

### *LAW REPORTS.*

We welcome the appointment of a Committee to investigate the problem afforded by the multifarious issue of law reports. Some of the series, it is true, are specialist series and do not frequently concern the average practitioner, but even then the general series are embarrassingly numerous. This embarrassment is increased where, as occasionally happens, the reports are not in harmony. No doubt where a case is reported in the Law Reports or the Law Journal Reports (in these reports the judgments are revised by the learned Judges) the report is to be preferred to others, but where it is not so reported who shall agree?

The specialist reports are not always confined in interest to the specialist concerned. So, for example, it is possible for a report of interest on the subject of negligence to be found only in the Lloyd's List Reports, though this may be very unusual, while the specialist reports may be incomplete in their special sphere. These inconsistencies do undoubtedly present difficulty to the practitioner in search of material.

The problem presented, however, primarily falls into two categories. First, the supply of reports to the profession in the most convenient and cheapest form, and secondly, the substance of which the reports should consist. It must be apparent that there is much waste labour in the duplicated reporting and printing of a report of the same case in a number of separate publications.

This waste has to be paid for and presumably it is the profession which pays. If the case was once reported and all subscribers subscribed to the same report it should be much cheaper to produce. It would also be more readily accessible. Particularly to country practitioners not within easy reach of a law library the duplication of reports presents serious embarrassment. They will doubtless subscribe to one or possibly two series of reports which may cover most of the cases they will require, but to find the occasional omitted report will involve them in considerable waste of time, if not actual physical difficulty. A single series, which ought to be cheaper relatively than is at present possible, would relieve such a practitioner of his difficulties. A proper digest, coupled with a proper index, would also greatly enhance the ease with which the reports could be used. Digests alone require considerable skill and experience, coupled with a vivid imagination of the possible heads of digesting, before the reader can be sure that he has covered every case that may have application to his problem. It is hoped that the Committee will not omit from their survey this question of digesting and indexing the reports. The labour of finding relevant cases is often as great as that of applying them.

The substance of the reports appears to present a more difficult problem in principle. It is, of course, easy to say that all substantial developments, modifications, or explanations of principle should be reported. It is common knowledge that this does not occur. The writer was interested in a case relating to what in the country is not an uncommon transaction and concerning the legal character of which there was, and it is believed still is, only a reported *dictum* of a now deceased Judge. The case was heard on appeal from the county court where the learned Judge had followed this *dictum*. The Divisional Court dissented from this *dictum*, but the case was never reported. It seems important that some steps should be taken to ensure greater certainty in obtaining reports of decisions that are of importance to the profession.

One of the great difficulties which confront reporters is to know during the hearing of a case whether or not it is to be one introducing a new principle. It is even more difficult to ascertain whether a judgment is going to throw light, by way of qualification or explanation, on existing principle. This becomes apparent when the use made by authors of text-books and articles of reported decisions is examined. Opinions, even among experts, vary considerably not only upon the importance but also the application of a number of such cases. It is with deference suggested that Editors of Reports should err rather on the side

of liberality than of exclusion in the number of cases reported as providing principle.

There is, however, another aspect of the reports which is not so commonly canvassed, but must affect many of our readers more particularly those situated in the country. The principle of the law may be well settled, but its application may not be equally apparent in the rapidly changing circumstances of modern life. A commonplace example is that the law of negligence on the highway was largely built up in connection with horse traffic and on roads free from Belisha beacons. The number of cases show that there is much to be learnt about new conditions though no doubt many, if not the overwhelming majority, of the cases turn on particular facts. Where a practitioner is not constantly involved in this type of litigation it is valuable to see how other cases have gone, wherever any law is involved, both as a guide to its application to modern circumstances and to the general attitude of the Courts towards the problem involved. To take again the writer's experience from a case in which he was concerned, it would be of interest to know whether the Court adopted the view that generally speaking a motorist should not travel behind another at a greater speed or nearer distance than he could stop in the event of the front car stopping unexpectedly. It is obvious that in such cases circumstances must vary, but the Courts could express a general view which would assist litigants.

Perhaps a matter of even greater importance is the construction of documents. A very large number of such cases are heard every year, particularly on originating summons in the Chancery Division, but comparatively few are reported. Most documents, and particularly wills, do vary to some extent in the wording, and in the circumstances which affect them, and the Court must construe the intention of the parties. Consequently a reported decision is not commonly on all fours with the practitioner's problem, but a knowledge of how the Courts have approached similar problems, not only on the general principles of law, but also on the facts, is of great help in advising a client upon his position in anticipated litigation. So, to quote again from personal experience, on construction it was held that a residuary gift that looked like a class gift was held not to be a class gift in reliance upon some old cases decided long before *Kingsbury* v. *Walter*, [1901] A. C. 187, but the case was not reported. It may be added that the form of the gift was not uncommon. It is suggested with deference that even in cases of construction the Court has from time to time varied in its attitude and the importance attached to certain aspects of a case.

This second problem presented has certain peculiarities of which perhaps the most important is that it tends to be more ephemeral in character and perhaps less appropriate for citation as authority. It is thought that it might be met by an extended use of such forms of publication as Weekly Notes containing many cases not intended to be reported in more extensive form. The reports themselves should be fully adequate on the facts, the curtailing of which is a danger in the present abbreviated forms of report, but the judgment need not necessarily be reported in full if the substance on relevant issues is properly given. In other words such corrollaries to the more elaborate reports should not be regarded as a forenote of what is to come, but as serving a substantially different purpose. They would be rather illustrations of the application of principle where the facts are sufficiently common or important to enable the practitioner to feel that he has a sure footing for his own problems. If the danger of reasoning by analogy were regarded as too great it might even be possible to provide that such reports were not to be taken as authorities binding on the Courts but to be used only in the discretion of the advocate as an illustration of his argument analogous to the use of modern text books.

No doubt such a differentiation between the form of reports would impose a heavy burden of selection upon the Editor, but it is thought that it would in reality be no heavier, if indeed as heavy, as that now involved in deciding upon rejection.

We venture to devote so much attention to the work of this Committee because it may inaugurate something that will be almost revolutionary in the history of our law. It would be more revolutionary if it were not evolutionary, marking a natural stage onwards from the development of the Reports of the Incorporated Council of Law Reporting. Conveyancers may be less obviously concerned with case law than those concerned in litigation, but the volume of cases noted quarter by quarter in this Review show how much they are affected in their daily practice of investigating titles and drawing documents. We would welcome the opinions of subscribers.

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*Leaseholds comprised in a settled residuary gift—rule in Howe* v. *Dartmouth—L. P. A.*, 1925, *s.* 28 (2)—*A. E. A.*, 1925, *s.* 39 (1).—Before 1926, leaseholds comprised in a settled residuary gift were regarded by equity as a wasting security. Accordingly, in pursuance of the rule that trustees must hold the scales evenly between the beneficiaries, equity imposed two duties upon the

executors and trustees: (i) to sell the leaseholds and invest the proceeds in authorised investments; (ii) pending conversion, to allow the life-tenant only so much of the income as a 4 per cent. investment would have given him, any surplus income being invested and treated as capital. When, as in *Gibson* v. *Bott* (1802), 7 Ves. 89, a trust for sale was already in existence, equity had no need to do more than reduce the income—as in (ii) above. But when, as in *Howe* v. *Dartmouth* (1802), 7 Ves. 137 a, there was no existing trust for sale, it was necessary to imply one; for equity's primary object was to obtain a permanent reliable investment in place of the wasting leaseholds, and the ancillary rule as to capitalising part of the income pending sale was but a temporary expedient to ensure that the remaindermen would not be unduly prejudiced if the desired conversion was delayed.

By virtue of section 28 (2) of the Law of Property Act, 1925, trustees are now required (unless the trust directs the contrary) to pay to the life-tenant the *whole* of the net profits of land held on trust for sale. Since the Act, two cases of the *Gibson* v. *Bott* type have accordingly decided that a life-tenant of residuary leaseholds on trust for sale is now entitled to an unreduced income therefrom. In *Re Brooker*, [1926] W. N. 93, the will itself imposed an express trust for sale. In *Re Berton*, [1939] 1 Ch. 200 (noted *ante*, pp. 222—223), a trust for sale arose automatically, by virtue of sections 34 (3) and 35 of the Law of Property Act; for there the residuary bequest was to tenants in common, subject to the payment of two-thirds of the income to the testator's widow for her life. A learned correspondent now raises the question whether the full income should be paid to the life-tenant in cases where no express or statutory trust for sale exists, and whether the position will be affected if the personal representatives retain the leaseholds in their own hands.

It will be observed that neither *Re Brooker* nor *Re Berton* decides how a case of the pure *Howe* v. *Dartmouth* type—having no express or statutory trust for sale—is affected by section 28 (2). It would seem that there is nothing in the Act to change the well-established view of equity that the leaseholds are a wasting security and should therefore be converted—*i.e.*, that an implied trust for sale arises, as before the Act. The fact that section 28 (2) will then negative the ancillary duty to reduce the life-tenant's income pending sale, can hardly negative the established presumption that the testator would wish this wasting asset to be replaced by a reliable permanent investment. The learned editors of *Wolstenholme & Cherry's Conveyancing Statutes* (12th edition), at p. 271, appear to doubt this, arguing that if a testator were expressly to

direct payment of the full income to the life-tenant this would be taken as an indication that the testator desired the retention of the leaseholds as a permanent investment. But such an argument raises several difficulties; for, even if one accepts the fiction that section 28 (2) has impliedly changed the presumed intentions of testators, the conclusion that no trust for sale arises means also that the section (which applies only where there *is* a trust for sale) does not apply at all.

The main difficulty, therefore, when a settled residuary gift includes leaseholds, lies not in any doubt as to the life-tenant's right to the whole of the net income from the leaseholds, but in the doubt as to whether (in the absence of an express or statutory trust for sale) they are "settled land". If *Howe* v. *Dartmouth* still operates to impose a trust for sale upon the leaseholds, it is presumably an "immediate binding" trust for sale and so prevents them from being settled land. Accordingly, the personal representatives are trustees for sale and have the normal powers to postpone the sale (L. P. A., s. 25), to delegate powers of leasing and management to the life-tenant (*ibid.*, s. 29), and to allow him to take possession; and he is entitled (*ibid.*, s. 28 (2)) to the whole income of the leasehold property. If, however, the Wolstenholme view is correct, there is no trust for sale: the land is therefore "settled land", and, assuming (as Wolstenholme assumes) that equity would not reduce the life-tenant's income, he is a person who has the statutory powers of a tenant for life and can therefore claim a vesting assent.

It would thus appear that if the life-tenant claims a vesting assent (*e.g.*, by an application under A. E. A., 1925, s. 43 (2)), he must be prepared to prove that, so far as leaseholds are concerned, *Howe* v. *Dartmouth* is dead: *i.e.*, that it neither raises a trust for sale nor operates to reduce his income. And it would seem to follow that, so long as the law on this point remains unsettled, an executor who makes such a vesting assent is taking a risk. The question thus arises whether some course is open to personal representatives which will obviate that risk. And the answer appears to be that they can avoid it by retaining the leaseholds, in their capacity of personal representatives, until the life interest ceases.

That they can properly so retain the leaseholds appears to follow from section 39 (1) of the Administration of Estates Act, 1925, whereby, "in dealing with the real and personal estate of the deceased his personal representatives shall, for purposes of administration, or during . . . the subsistence of any life interest, or until the period of distribution arrives, have . . . all the

powers, discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale". These duties, presumably, will include that imposed upon trustees for sale by section 28 (2) of the Law of Property Act—*viz.*, to pay the whole of the net income of the leaseholds to the life-tenant; for, although *Re Trollope's Will Trusts*, [1927] 1 Ch. 596, decides that this duty would be inapplicable to pure personalty thus retained by personal representatives, that decision (at p. 605) appears to assume that the duty in question would apply when they are so retaining land.

The only limit imposed upon this power to retain, impliedly given to personal representatives by section 39 (1), is found in sub-section 2: "Nothing in this section affects the right of any person to require an assent or conveyance to be made." As we have seen, it is by no means clear that the life-tenant has any "right" to require a vesting assent in these cases; for it may be that *Howe* v. *Dartmouth* still operates to impose a trust for sale. In view of the facts that the personal representatives, as such, have the powers (of trustees for sale: section 39 (1)) to let the life-tenant into possession (*ibid.*, and see section 43 (1)) and to delegate their powers of leasing and management to him (L. P. A., 1925, s. 29) and that he is assured meanwhile of an unreduced income, there would seem to be no good reason why he should wish to attempt to establish (by application under A. E. A., 1925, s. 43 (2)) a right to a vesting assent. If the personal representatives retain the land, as suggested, there should be no need to test the law on that point; for it would appear (*Wolstenholme & Cherry*, p. 1479) that their power thus to retain the land, under section 39 (1) of the Administration of Estates Act, "during the subsistence of any life interest", is equally applicable whether that life interest arises under a trust for sale or raises a strict settlement.

Should the Wolstenholme view be adopted, that the leaseholds are settled land and that the personal representatives can safely make a vesting assent in favour of the life-tenant (instead of retaining the leaseholds in their own hands), a further transfer of the legal title becomes necessary when the life interest ends. In the common case of a residuary bequest to the testator's widow for life with remainder to his children in equal shares, a vesting assent to the widow would be followed, at her death, by a statutory trust for sale for the children; and, by section 36 of the Settled Land Act, her personal representatives must thereupon vest the land in the trustees of the settlement—who will ordinarily be the deceased husband's personal representatives (S. L. A., s. 30 (3))—to hold on the statutory trusts: see *Re Cugny's Will Trusts*, [1931]

1 Ch. 305; *Re Thomas*, [1939] 1 All E. R. 379 (*post*, p. 334). The curious result would therefore follow that, although the husband's personal representatives have made a vesting assent in favour of his widow, the land would be returned to them when she dies.

S. J. BAILEY.

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## H.M. LAND REGISTRY.—OFFICIAL SEARCHES OF THE INDEX MAP—COUNTY BOROUGH OF CROYDON.

We have received the following notice from the Chief Land Registrar:—

"1. The Chief Land Registrar announces that on and after January 1, 1939, when registration of title on sale became compulsory in the County Borough of Croydon, official searches of the Index Map of that area to ascertain whether or not land is registered or whether there are any cautions or priority notices against first registration will be made without fee and without a plan, provided that such a description of the land to be searched against on the Index Map is given (*e.g.*, by road number) as will enable the land to be identified thereon. The application for search need be in no special form. It should be made by post and will be answered by return of post.

"2. Solicitors are requested to note that a similar service cannot be extended to non-compulsory areas. In such areas Rule 286 must be complied with, and a fee of 5s. must accompany the application for the search."

# LIABILITIES OF LANDLORDS UNDER SOME RECENT STATUTES.

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The writer has recently had to consider the possible effects on landlords of some of the provisions of the Factories Act, 1937; the observations which follow, arising as a result of this consideration, may be of assistance to draftsmen preparing leases of premises to which that Act may apply. Incidental reference will also be made to the Shops Act, 1934, and the Public Health Act, 1936.

By way of preface, it may be well to explain that the Shops Act, 1934, the Public Health Act, 1936, and the Factories Act, 1937, all contain a similar definition of the word "owner", taken from the old Public Health Act, 1875. The "owner" is "the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the rackrent if the premises were let at a rackrent".

By the Acts just referred to, certain obligations are imposed on "owners" as opposed to "occupiers". What follows is an estimation of the extent to which, by apt drafting of leases, it is possible to impose the burden of these obligations on the lessee-occupier in exoneration of the landlord-owner.

Two common-form lessee's covenants have usually hitherto been relied on in this connection: first, the covenant to the effect that the lessee "will from time to time and at all times during the term pay and discharge all rates taxes duties charges assessments and outgoings whatsoever . . . which are now or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises or the owner or occupier in respect thereof . . ." (*Key & Elphinstone's Precedents*, 13th ed., Vol. I, p. 892); and secondly, the covenant to the effect that the lessee "will execute all such works and provide and maintain all such arrangements as are or may under or in pursuance of any Act or Acts of Parliament already or hereafter to be passed be directed or required by any district council local or public authority to be

executed at any time during the term upon or in respect of the demised premises whether by the landlord or tenant thereof." (cf. *op. cit.*, p. 897).

Under the old law as to factories and workshops (Factory and Workshop Act, 1901, s. 14 (2), repealed from July 1, 1938) a district council were bound, when a factory or workshop of a specified class was not provided with proper means of escape in case of fire, to serve on the owner a notice requiring the execution of such works as were requisite for remedying the deficiency; and the owner was bound by the Act to carry out these works, notwithstanding any agreement with the occupier, under penalty if he failed to do so. The owner could then apply to the county court (section 14 (4)) for an apportionment of the expenses as between himself and the occupier.

(It is perhaps worth mentioning at this point that although the owner was bound, under the 1901 Act, to carry out the works just mentioned "notwithstanding any agreement with the occupier", he could not be compelled to make alterations which involved an invasion of the rights of third parties : *L. C. C.* v. *Lewis* (1900), 69 L. J. Q. B. 277; *L. C. C.* v. *Brass* (1901), 17 T. L. R. 504; *Toller* v. *Spiers & Pond*, [1903] 1 Ch. 362.)

The statutory responsibility of the owner just referred to was apparently the only thing of its kind in the 1901 Act. The owner could be called on to contribute towards expenses necessitated for complying with certain other requirements of the Act : section 7 (ventilation) and section 101 (structural alterations in connection with underground bakehouses); but in those cases there was no primary liability on the owner to execute works himself.

The new law under the Factories Act, 1937, which came into force on July 1, 1938, appears considerably to increase the burden on the owner. The old law applied to "factories" and "workshops", with very elaborate definitions which are now swept away and replaced by a new definition of "factory" which seems to be comprehensive enough to include all places which were formerly either "factories" or "workshops", and quite possibly some others : 1937 Act, s. 151. The new definition is too lengthy to set out here in full, and the Act should be consulted; we may, however, reproduce parts of section 151, whereby it is provided that the expression "factory" "means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely :—

(a) the making of any article or of part of any article; or

(b) the altering, repairing, ornamenting, finishing, cleaning,

or washing, or the breaking up or demolition of any article; or

(c) the adapting for sale of any article

being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control: And (whether or not they are factories by reason of the foregoing definition) the expression 'factory' also includes the following premises in which persons are employed in manual labour . . ." Here follows an enumeration of thirteen classes of premises which include (*inter alia*) laundries, printing shops, locomotive and other repair shops, and premises in which the production of cinematograph films is carried on by way of trade or for purposes of gain. The net, it will be realised, is cast wide. A landlord whose premises are let under a lease whereby the user is not carefully restricted may quite easily find himself involuntarily the "owner" of a "factory"; all sorts of workshops and workplaces which in ordinary parlance would seldom or never be so described are "factories" for the purposes of the Act. It may be added that the statutory requirements as to provision of means of escape in case of fire (1937 Act, s. 34) will now apply more widely than did those under section 14 of the 1901 Act.

Section 102 of the new Act is so important in connection with the subject-matter of the present inquiry that it must be reproduced virtually in full. It is as follows:—

"102.—Where a part of a building . . . is let off as a separate factory, the provisions of Part I of this Act with respect to cleanliness and lighting, and the provisions of Part II of this Act with respect to prime movers, transmission machinery, hoists and lifts, steam boilers, and the construction and maintenance of floors, passages and stairs, shall apply to any part of the building used for the purposes of the factory but not comprised therein, and the owner of the building shall be responsible for any contravention of the said provisions and shall also be responsible, instead of the occupier of the factory, for any contravention as respects the factory of the provisions of Part I of this Act with respect to sanitary conveniences and the provisions of Part II of this Act with respect to hoists and lifts, steam boilers, means of escape in case of fire, and safety provisions in case of fire, and for the purposes of the last-named provisions with respect to means of escape in case of fire and safety provisions in case of fire, the factory shall be deemed to include any part of the building used for the purpose of the factory:

"Provided that the owner shall be responsible for the cleanliness of sanitary conveniences only when used in common by several tenants, and shall be responsible for any contravention of the provisions relating to hoists and lifts, steam boilers, means of escape in case of fire, and safety provisions in case of fire, only in so far as the said provisions relate to matters within his control."

Considerations of space prevent a detailed examination of the various provisions alluded to in the section just cited; it will suffice if the reader is assured that if he refers to the Act (sections 1, 5, 7, 12, 13, 22, 25, 29, 34 and 36), he will find that some of the requirements are distinctly onerous in their nature. The Act (section 130) makes any contravention by the owner of the new requirements of section 102 an offence, punishable by fine as thereby provided: see section 131; under section 132 the Court may, in addition to or instead of fining an offending owner, require the execution by him of works to remedy the state of affairs complained of; and there may also be a serious liability under section 133 in respect of death or injury of any person resulting from a contravention.

It requires but little consideration to see how hard may be the case of a landlord under the provisions of the new Act to which reference has been made above. To what extent would he be protected by such lessee's covenants as those quoted in an earlier paragraph?

Expenses under sections 7 (ventilation), 14 (means of escape in case of fire) and 101 (underground bakehouses) of the Factory and Workshop Act, 1901, might be regarded as "outgoings" within the covenant to pay "rates taxes . . . and outgoings" mentioned above: *Foulger* v. *Arding*, [1902] 1 K. B. 700; *Arding* v. *Economic, etc., Co.*, 79 L. T. 622; *Horner* v. *Franklin*, [1904] 2 K. B. 877. The 1901 Act provided, however, as regarded such expenses, for applications being made to a judicial tribunal—a Court of summary jurisdiction in two cases, the county court in the other—to apportion them between the owner and the occupier. The effect of these provisions was to oust the jurisdiction of the High Court to entertain an action on the covenant when it was sought to enforce it in connection with such expenses. To quote the note in *Key & Elphinstone's Precedents* (13th ed., Vol. I, p. 893): "Such expenses, however, are apportioned between the landlord and tenant—not according to the terms of the contract between them, but as may appear to the statutory tribunal . . . just and equitable in the circumstances of the case, of which the contractual relations between the parties form part only." The authorities for this statement are *Monk* v. *Arnold*, [1902] 1 K. B.

761; *Horner* v. *Franklin*, [1905] 1 K. B. 479 (C. A.), and *Stuckey* v. *Hooke*, [1906] 2 K. B. 20 (C. A.). The Factories Act, 1937, provides by section 147, in terms not dissimilar to those of the earlier statute, that an owner or occupier who has incurred expenses in carrying out structural or other alterations in order to comply with the requirements of the Act may apply to the county court to apportion the expenses; the same principle will therefore still apply.

*Monro* v. *Burghclere* (*Lord*), [1918] 1 K. B. 291, is, however, authority for the further proposition that if the possibility of the imposition of such a burden was, at the inception of the contract, within the contemplation of the parties, and it is clear that they intended that the burden should fall to be borne by the tenant in exoneration of the landlord, then it is not "just and equitable" to apportion any part of the expenses against the landlord, and the statutory tribunal is bound to decide accordingly. If the lease contains a lessee's covenant binding him to "execute works and provide and maintain arrangements" necessary to comply with the requirements of local authorities, as in the second form quoted in the fourth paragraph of this article, this circumstance will be conclusive as to the intention of the parties at the inception of the contract, and the landlord will accordingly be protected against an apportionment against him in respect of expenses of this kind.

It seems clear that if a landlord is to be fully protected against the burden of expenses incurred in complying with requirements of the Factories Act, 1937, it will not be enough for him to rely merely on the usual lessee's covenant to pay rates, taxes, duties, charges, assessments and outgoings; something is required in addition, indicative of the intention of the parties to the contract to saddle the tenant with the whole burden. For this purpose, a provision in the lease itself is obviously best suited. The second covenant already referred to sufficed for the purposes of burdens imposed under the Factory and Workshop Act, 1901; it would seem, however, that it will not so suffice in relation to the burden imposed by the 1937 Act.

The old form of lessee's covenant, it will be noticed, bound the lessee to execute works, etc., which "are or may . . . be directed or required by any district council local or public authority". The liabilities of an "owner" under sections 7, 14 and 101 of the Factory and Workshop Act, 1901, arose out of a requirement of a public authority, signified by a notice served on him; unless and until the notice embodying the requirement was served, the owner was under no liability. Under the Factories Act, 1937, the position is different. The owner's liability does not arise primarily

by reason of a notice served or requirement made by a local or other competent authority; it arises out of the Act itself: see section 102, quoted above. The Act imposes an absolute duty upon the owner to secure conformity with the provisions of the Act in the circumstances specified in section 102; and by an act or omission the owner may be guilty of a contravention irrespective entirely of the service of any notice or other expression by some public authority of any "requirement" or "direction". It would appear, therefore, that the old form of covenant fails to indicate with precision an intention of the parties that the tenant is to bear the burden of these new requirements. Nor, it seems, does the covenant in itself bind the lessee to carry out works which may become necessary by reason of the new Act, in cases within section 102, where part of a building is let off as a separate factory; it binds him to execute only such works as may be required by an authority under an Act, leaving it open to argument (to put it no higher) that the tenant is entitled to relief by way of an apportionment of part at any rate of the expenses against his landlord.

It will be convenient at this point to refer to the two other statutes already briefly mentioned under which owners, as opposed to occupiers, may be under special liabilities, namely the Shops Act, 1934, and the Public Health Act, 1936. The old form of lessee's covenant as to "executing works and providing and maintaining arrangements" (*supra*) was sufficient, in the writer's view, effectively to protect owner-landlords against the possibility of having to bear any part of expenses incurred in complying with the requirements of those Acts; in redrafting the form of covenant to "fit" the Factories Act, 1937, it is important not to sacrifice the protection it gave in respect of the other Acts.

Section 10 of the Shops Act, 1934, deals with the provision in shop premises of sanitary and other arrangements for the health and comfort of the workers—proper ventilation, reasonable temperature, sanitary conveniences, means of lighting, washing facilities, and facilities for taking meals. If the responsible authority (for which see Shops Act, 1912, s. 13) consider that there has been, in the case of any shop, a contravention of a provision of the section, they must serve a notice on the owner, requiring him to rectify the deficiency by executing the necessary works; and if he fails to comply, he becomes liable on conviction to a penalty. In section 11 there follows a provision in similar terms to those of section 147 of the Factories Act, 1937, giving jurisdiction to the county court to make such order "concerning the expenses or their apportionment as appears to the court, having

regard to all the circumstances of the case, including the terms of any contract between the parties, to be just and equitable, and any order made under this section may direct that any such contract as aforesaid shall cease to have effect in so far as it is inconsistent with the terms of the order". It is submitted that, notwithstanding the last sentence, the principle enunciated in *Monro* v. *Burghclere* (*Lord*) (*supra*) applies to apportionments under this section.

The Public Health Act, 1936, was, as the reader is probably aware, an amending as well as a consolidating statute; the terms of reference of the Local Government and Public Health Consolidation Committee (to whose Second Interim Report (1936, Cmd. 5059) was appended the draft Bill which, with little modification, became the Act) required them to consider amendments of the former law desirable for "securing simplicity, uniformity and conciseness". Under the various statutes which are replaced by the 1936 Act there were considerable variations of procedure in connection with the powers of local authorities to require owners and occupiers to remedy defects. There were cases (a) where the owner's liability arose from the statute itself, and default rendered him liable to a penalty (this is what happens under the Factories Act, 1937); (b) where the local authority's notice was a condition precedent to the owner's liability (cf. Shops Act, 1934, s. 10); (c) where the notice had to specify the works to be executed and the time limit for their completion. The 1936 Act introduces "a uniform procedure based on the principle that, before incurring expense of executing works in default of the owner, the local authority should be in a position to know whether their requirements are lawful. The new procedure is: (1) the local authority to serve notice on the owner indicating the work required, and requiring him to execute it in a given time; (2) the owner to have a right of appeal within twenty-one days; . . . (3) subject to this right of appeal, the local authority to have power to do the work if the owner makes default, and recover the cost from him (in addition, the owner to be liable to a fine for non-compliance); (4) no issue which might have been raised on appeal to be available as a defence in proceedings brought by the local authority to recover the expenses" (*Samuels' and Fores's Public Health Act*, 1936, p. 4). The general provisions as to "notices requiring execution of works" will be found in section 290 of the 1936 Act; they apply to notices under the following provisions in the Act, namely, section 25 (3), pulling down buildings over sewers; section 39 (1), provision of drains; section 40 (4), rectifying soil pipes, etc.; sections 45, 46 and 47, defective closets, sanitary conveniences in workplaces, and installa-

tion of water closets; section 50, cesspools; section 56, paving yards; section 59 (2), exits and entrances of public buildings; section 60 (1), fire escapes; section 88, public sanitary conveniences; and section 264, repairing culverts. As respects existing buildings, it can be taken that the service of a notice by the local authority is a condition precedent to liability for compulsory expenditure by an owner; he is under no immediate liability arising out of the statute itself, as he is under the Factories Act, 1937.

The provisions as to apportionment of expenses contained in section 290 of the Public Health Act, 1936, are differently expressed from those in section 11 of the Shops Act, 1934, and section 147 of the Factories Act, 1937. Among the grounds for appeal against the requirements of a notice requiring the execution of works is "that the notice might lawfully have been served on the occupier of the premises in question instead of on the owner, or on the owner instead of on the occupier, and that it would have been equitable for it to have been so served". Where an appeal is lodged on this ground the Court, at the hearing, is empowered to make "such order as it thinks fit with respect to the person by whom any work is to be executed and the contribution to be made by any other person towards the cost of the work, or as to the proportions in which any expenses which may become recoverable by the local authority are to be borne by the appellant and such other person". In exercising its powers, the Court must have regard "(a) as between an owner and an occupier, to the terms and conditions, whether contractual or statutory, of the tenancy and to the nature of the works required; and (b) in any case, to the degree of benefit to be derived by the different persons concerned." It is submitted that in the application of these provisions, as of those of section 11 of the Shops Act, 1934, the principle of *Monro* v. *Burghclere* (*Lord*) (*supra*) applies notwithstanding the different mode of expression.

Reverting now to the Factories Act, 1937, it must be noted that the expenses of executing works are not the only matters against which a landlord may desire to be protected. A contravention of the requirements of the Act may involve payment of a penalty, in addition to payment of the expenses of rectifying the state of affairs giving rise to the complaint. As to protection against penalties, the view of the writer is that it would be unsafe to rely on a contract by the lessee to indemnify his landlord against all penalties to which the landlord may be subjected as well as to bear all expenses of executing works; the writer's opinion is that such a contract, so far as it related to indemnity against penalties, would probably be contrary to public policy, and accordingly void and

unenforceable. There are however (as the proverb has it) more ways of killing a dog than choking it with butter. If the lessee were to contract so to use the demised premises and otherwise to conduct himself in relation thereto that his landlord would not become liable to any penalty—in other words, not by any acts or omissions to expose the landlord to the risk of a successful prosecution—then if the landlord *were* convicted of a contravention of the Act, involving a penalty, the amount would, it appears, probably be recoverable from the tenant in the form of damages for breach of covenant.

The question discussed in the last paragraph appears to the writer to be of some importance, for it seems that unless a tenant is prohibited therefrom by the terms of his contract he may, by some quite innocent act or omission, involve his landlord in a contravention of the Act. An example may make this clearer. The Act requires (section 7) the provision of sufficient and suitable sanitary conveniences for the persons employed, and requires that where persons of both sexes are employed (other than members of the same family) such conveniences shall afford proper separate accommodation for persons of each sex. Now the sanitary accommodation provided for use in connection with part of a building let off as a separate factory (see section 102, above) may be "sufficient and suitable" so long as men only are employed there, but may cease to satisfy the statutory requirements if at some later time women are taken into employment as well as men. A tenant would be acting entirely within his rights, unless prohibited therefrom by his lease, in employing women as well as men; and yet by so doing he might well be increasing the burden on his landlord and possibly involving him in a penalty; and it is by no means clear (in the writer's view) that the provisions of the Act would adequately protect the landlord. The upshot seems to be that it will be desirable to make the lessee contract, *inter alia*, not to do or omit on the demised premises (and, where part only of a building is let as a separate factory, any part or parts used for the purposes of but not comprised in the demised premises of the building of which the demised premises form part) any act or thing whereby the landlord may become liable to pay any penalty, damages or compensation.

Before concluding this already overlong inquiry, one other point calls for brief mention. Section 147 of the Factories Act, 1937, provides, as already mentioned, that when expenses of structural or other alterations necessitated by the Act have been incurred, there can be a reference to the county court, which is empowered, after hearing the case, to "make such an order concerning the

expenses or their apportionment as the court considers just and equitable in the circumstances of the case, regard being had to the terms of any contract between the parties". There is, however, a further power in the Court; the section concludes: "or in the alternative the court may at the request of the owner or occupier determine the lease." As to this last provision, it is submitted that the principle of *Monro* v. *Burghclere* (*Lord*) (*supra*) ought to apply as it does to the question of apportionment; the parties to a lease clearly cannot "contract out" of the Act in the sense of agreeing that the provisions of section 147 are not to apply to their case; but if the lessee has contracted to do works rendered necessary by the statute it would, in the writer's submission, be no more "just and equitable" to give him relief by terminating the lease (supposing the landlord to object) than it would be to apportion part of the expenses against the landlord.

We can now sum up the problem which confronts the draftsman who is attempting to protect an owner-landlord client against liability under the Acts referred to. In the first place, he must endeavour to show on the face of the contract—the lease itself—an intention of the parties to throw the whole burden of any liabilities on the tenant in exoneration of the landlord; in this connection, he will be careful to refer to future legislation as well as that already in force at the date of the lease, and he will not be unaware of the tendency of the times to secure better living and working conditions for the less wealthy elements of the populace. The new Public Health Act has given local authorities extended powers in relation to offices and other workplaces, and the Factories Act has tightened up and fortified the law as to workshops and factories; there is likely to be an intensification of social effort in this direction.

Secondly, the draftsman will bear in mind that the owner's liability may arise in different ways; it may arise out of direct requirements of Acts themselves, or regulations made under Acts, whereby definite standards are laid down with which premises have to conform; or it may arise out of requirements of a local or other public authority, under powers conferred by Acts.

Next, the draft must cover, so far as it can, any question of penalties for infringements of statutory standards, in addition to expenses of executing works; it must bind the tenant so to conduct himself in his use of the demised premises as not to expose his landlord to risk of prosecution.

Lastly, if (as was the writer's case) the client is a landowner on a big scale, who is continually granting leases of properties of every sort and condition, the draftsman must endeavour to shape

his draft clause in a general way, for normal inclusion in a standard form of lease.

The task is not simple. By kind permission of the client for whom it was prepared, the writer's draft lessee's covenant aimed at covering these difficulties is reproduced among the precedents published in this volume of *The Conveyancer and Property Lawyer* (p. 521, *post*); it is probably susceptible of improvement, but practitioners may find it of use, if only as a suggestion of the sort of clause on which they can model a better form. When, as sometimes happens, the landlord is prepared to bear part of a possible burden—as, *e.g.*, when the letting is of one or two rooms only, and to impose the whole cost of a possible new fire escape on the tenant would be quite unreasonable—the clause can be qualified by the insertion at the end of a proviso, without disturbing the body of the covenant. The writer is informed that in practice there is little difficulty in obtaining tenants' consents to the covenant.

# THE FINANCE ACT, 1938, PART III (ADMINISTRATION OF ESTATES).

By Leonard Stein, Barrister-at-Law.

## I.—Introductory.

Ever since the *Barnardo's Homes Case* (1921), 7 T. C. 646, it has been settled law that where a person has an absolute interest in the residue of an estate, the income of the estate during the period of administration cannot, as to any part of it, reach him as income. Such income can come into his hands only in so far as, having been merged in the mass of assets out of which the residue ultimately takes shape, it is received by him as capital. In the case of charities, a statutory exception to the rule was provided by section 30 of the Finance Act, 1922, which was designed to mitigate the effect of the decision in the *Barnardo's Homes Case*, above, by enabling a charity entitled to the residue of an estate (or a share of the residue) to claim repayment of tax on the income which it would have had if the distribution of the residue had been completed at the expiration of the executors' year.

As to persons having a life interest or other income interest (as distinct from an absolute interest) in the residue of an estate, such doubts as were left by the *Marie Celeste Case* (1926), 11 T. C. 226, were dispelled by *Corbett's Case* (1937), 21 T. C. 449, where it was held that the principle laid down in the *Barnardo's Homes Case*, above, was of general application to residuary interests, so that where a sum was payable to a life tenant of residue in compliance with the principles propounded in *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295, that sum, though computed by reference to the income of the estate during the period of administration, could not be brought into the computation of the life tenant's total income.

The law as to the tax position of residuary legatees in respect of income arising while the estate is under administration has now been drastically altered by Part III of the Finance Act, 1938. Life tenants of residue and persons having absolute interests in residue are alike affected by the new legislation, which nullifies, not merely the application of the *Barnardo's Homes* decision in

*Corbett's Case*, but the *Barnardo's Homes* decision itself. On the other hand, charities which are the objects of residuary bequests will benefit by being enabled to claim repayment of tax on notional income, not merely (as under the 1922 Act) as from the expiration of the executors' year, but as from the testator's death. What follows does not purport to be an exhaustive analysis of sections 30—37 of the 1938 Act. All that can here be attempted is an outline of their main provisions.

## II.—Life Interests and Other Limited Interests in Residue.

Persons having life interests or other limited interests in residue are dealt with in section 30 of the 1938 Act. In the determination of the tax liability of such persons under the new legislation there are two distinct stages. In the first stage the position is simply that, if a person having a limited interest in the residue of an estate has, during the period between the death of the deceased and the completion of the administration (described in the Act, and hereinafter referred to, as "the administration period"), received a payment in respect of that interest, he is to be treated as having received that payment as income for the year of assessment in which it was made. Let it be supposed, for example, that X dies on April 6, 1939, leaving a life interest in the residue of his estate to Y, and that the administration of X's estate is not completed until April 5, 1942. A payment of £500 was made to Y in respect of his interest in the residue on January 1, 1940, and a further payment of £500 on January 1, 1941. Those payments will fall to be treated as income of Y for 1939-40 and 1940-41 respectively. The manner in which they are to be quantified for the purpose of computing Y's tax liability will be discussed in due course.

This is the position so far as the first stage is concerned. The second stage is reached when the administration of the estate has been completed. An account must then be taken of the aggregate amount of (a) the sums (if any) actually paid to X, in respect of his life interest in the residue, during the administration period, and (b) the sum payable to him in respect of that interest on the completion of the administration for the purpose of satisfying his claims under the rule in *Allhusen* v. *Whittell*, above. This aggregate amount is to be treated as income which accrued due to Y from day to day during the administration period and was paid to him as it accrued due. In the case supposed, each of the two payments made to Y during the administration period amounted to £500, making £1,000 in all. If a further £2,000

became payable to Y, as life tenant of residue, on the completion of the administration, the result is an aggregate notional income of £3,000 spread evenly over the administration period; and since, in the case supposed, the administration period exactly corresponded to three tax years, the ultimate result is the attribution to Y of an income of one-third of the aggregate amount of £3,000, *i.e.*, £1,000, for each of the tax years 1939-40, 1940-41 and 1941-42, subject to quantification for the purpose of computing Y's tax liability as explained below.

In the first stage, however, the effect of the computation was, as has been seen, to attribute to Y a notional income of only £500 for 1939-40 and £500 for 1940-41. On the completion of the administration, the correct amount for each of these years turns out, as shown above, to be £1,000. If assessments have already been made on Y in respect of the notional income as computed at the first stage, section 34 provides for the making of the necessary adjustments at the second stage by way of additional assessments.

It may happen that, at the second stage, the correct amount of the notional income attributable for a given year of assessment to a person having a limited interest in residue turns out to be *less* than the amount attributed to him at the first stage. This would have occurred if, in the case supposed, Y had received a payment of £2,000 on January 1, 1941, and had become entitled to a further £1,000 on the completion of the administration. In the first stage he would have, for 1940-41, a notional income of £2,000; but if the aggregate sum which falls, at the second stage, to be spread over the administration period is £3,000, then, since the administration period covered exactly three tax years, the notional income attributable to Y for each of those years is ultimately found to be £1,000, so that for 1940-41 Y's notional income has, in the first stage, been put too high. If Y has already been assessed for 1940-41 on £2,000, any tax found to have been overpaid by him is to be repaid.

What applies to assessments applies also to reliefs. The attribution to a taxpayer, at the first stage, of a smaller notional income for a given year of assessment than turns out, at the second stage, to be correctly attributable to him for that year may have resulted in his not receiving relief to which he would have been entitled if the higher figure of notional income had been adopted. In such circumstances, section 34 provides for the granting of relief or additional relief as the case may require. Conversely, if the notional income for a given year of assessment turns out, at the second stage, to be *less* than it was taken to be

at the first stage, any excess relief which the taxpayer may thus have been enabled to obtain may, if not otherwise made good, be recovered from him by means of a Case VI assessment.

### III.—Persons Having Absolute Interests in Residue.

The computation of notional income for the purpose of the new legislation presents more difficulty in the case of persons having absolute interests in residue than in the case of persons having life or other limited interests. So far as the latter class of persons is concerned, the interest is purely an income interest, so that all that has to be done is to proceed on the simple principle that anything received or receivable by such a person during or at the conclusion of the administration period is to be treated as coming to him by way of income. On the other hand, where a person has an absolute interest in residue, this measure of his notional income will obviously be inapplicable, and some artificial means of measuring it for the purposes of the new legislation must be devised.

The case of persons having absolute interests in residue is dealt with in section 31, which must be read together with the supplementary provisions contained in section 32. The combined effect of these sections may be summarised as follows: The first step is to ascertain the "residuary income of the estate" for each year of assessment during the administration period. This is to be arrived at by making certain deductions from the "aggregate income of the estate" for that year, as defined by section 35 (7), which excludes from the "aggregate income" any income from property devolving on the personal representative otherwise than as assets for payment of the debts of the deceased. The deductions to be made from the "aggregate income" of an estate for any year in order to arrive at the "residuary income" are specified in section 32 (1). They consist of (a) the amount of any annual interest, annuity or other payment for that year which is a charge on residue—an expression defined in section 35 (6); (b) the amount of such administration expenses paid in that year as would, in the absence of any express provision in a will, be properly chargeable to income; (c) the amount of any of the "aggregate income of the estate" for that year to which a person has on or after assent become entitled by virtue of a specific disposition, as defined in section 35 (5).

The amount of the "residuary income of the estate" for a given year of assessment having thus been ascertained, the next step is to ascertain the "residuary income" for that year of the

residuary legatee. If he is absolutely entitled to the whole of the residue, his "residuary income" for any year will be the "residuary income" of the estate for that year; if he is absolutely entitled only to a share of the residue, his "residuary income" will be a proportionate part of the "residuary income" of the estate.

This paves the way for the ascertainment of the income which is for tax purposes to be attributed to the residuary legatee for each year of assessment during the administration period. Here also there are two stages. Sub-section (3) of section 31, which deals with the first stage, is concerned with actual payments to the residuary legatee during the administration period in respect of his absolute interest. The scheme of the sub-section is to treat those payments as income of the residuary legatee to the extent to which their aggregate amount does not exceed the aggregate amount of his "residuary income" for the administration period. How, then, are payments thus falling to be treated as income of the residuary legatee to be distributed among the years of assessment over which the administration period extends? The answer is that the allocation is to be effected on the footing that the residuary legatee is to be deemed to have had rights which entitled him to receive in each of those years of assessment an income of the amount of his "residuary income" for that year, and that the payments are to be deemed to have been available for application, and to have been in fact applied, in or towards the satisfaction of those rights as they accrued. In other words, it would appear that if the administration period extends over (say) three years of assessment, all payments received during that period are to be attributed to year I until the legatee's "residuary income" for that year has been covered; that all further payments, up to the amount of his "residuary income" for year II, are to be attributed to year II; and that all further payments, up to the amount of his "residuary income" for year III, are to be attributed to year III. Where the whole income of the estate is liable to United Kingdom tax, the amount of the residuary legatee's "residuary income" is, for the purpose of the computation just mentioned, to be taken to be the amount of that income less tax, this being balanced by the complementary requirement that the income attributable to the legatee for any year of assessment under sub-section (3) shall in such cases enter into his total income at its gross equivalent.

The second stage is dealt with in sub-section (4) of section 31. On the completion of the administration of the estate, there is to be attributed to the residuary legatee an income for each year

of assessment during the administration period of the amount of his "residuary income" for that year. It is obvious that the income attributed to him for a given year of assessment under sub-section (3) will not necessarily correspond—and will, in fact, frequently not correspond—to the income ultimately found to be attributable to him for that year under sub-section (4). Any necessary adjustments will be made as provided in section 34, in the same manner as the adjustments to be made, as already described, in the case of persons having limited interests in residue.

### IV.—Quantification of Income and Charge of Tax.

For the purposes of the quantification of income and charge of tax, a distinction is drawn between "United Kingdom estates" and "foreign estates". The effect of the definition in section 35 (8) is that, in relation to a given year of assessment, an estate is a "United Kingdom estate" if its income for that year consists wholly of income on which United Kingdom tax falls to be borne by deduction or otherwise. All other estates are "foreign estates", so that "foreign estates" include those of which the income consists partly of income on which United Kingdom tax falls to be borne and partly of other income.

In the case of life tenants and other persons having limited interests in residue, the effect of sub-sections (4) and (5) of section 30 is that, where the estate is a "United Kingdom estate", the income attributed to the legatee will be deemed to have borne United Kingdom tax, and will enter into his total income at its gross equivalent. Where the estate is a "foreign estate", tax at the standard rate is chargeable under Case IV of Schedule D on the actual amount of the income attributed to the legatee, and that income will, of course, enter into his total income at its actual amount. Where, however, United Kingdom tax falls to be borne on a part of the income of a "foreign estate", an appropriate proportion of the standard rate tax on the income attributed to the legatee will be remitted, while a corresponding part of that income will, on the other hand, enter into his total income for surtax purposes at its gross equivalent.

The case of persons having absolute interests in residue is dealt with in sub-sections (5) and (6) of section 31. Where the estate is a "United Kingdom estate", the amount of the income ultimately attributable to the residuary legatee will be a gross amount, so that there can be no question of increasing it to its gross equivalent in the computation of total income. It is expressly provided by sub-section (4) (a) that it is to be deemed

to have borne United Kingdom tax. Where the estate is a "foreign estate", standard rate tax is leviable under Case IV of Schedule D on the actual amount of the income attributed to the legatee, and that income will enter into his total income at its actual amount. Where the income of a "foreign estate" consists in part of income on which United Kingdom tax has been borne, provision is made in sub-section (6) of section 31 for an appropriate remission of the Case IV tax on the lines of that provided for, as already mentioned, by sub-section (5) of section 30, though the formula prescribed for the calculation is not precisely the same.

### V.—Commencement and Application of the New Provisions.

In relation to residuary interests in the estate of a deceased person the provisions of Part III of the 1938 Act apply, where otherwise applicable, irrespective of the date of the death.

The provisions of Part III with regard to life or other limited interests in residue have effect for all purposes for 1938-39 and subsequent years, and for surtax purposes for 1937-38. The provisions relating to absolute interests have effect for all purposes for 1938-39 and subsequent years.

Reference has already been made to the statutory privilege in respect of residuary income accorded to charities by section 30 of the Finance Act, 1922. That section is now repealed by sub-section (2) of section 37 of the 1938 Act, but, as pointed out in the introductory observations, charities which are residuary legatees will now be in a still more favourable position in respect of repayment claims, since income which has suffered tax will normally be attributable to them over the whole of the administration period.

It is again desired to make it clear that this article does not purport to be an exhaustive account of the provisions of Part III of the Finance Act, 1938. All that has been attempted is to sketch the main outlines of those provisions, and there are many points of detail with which it has not been possible to deal.

# CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from p.* 189.)

## Misdescription and Compensation.

(a) *Non-disclosure.*

To what extent is the vendor bound to point out to the purchaser the demerits or defects of the property? The general rule is "*Caveat emptor*"; and it is true that the purchaser must "look before he leaps". He cannot, however, discover by inspection of the property all the matters which are material in relation to the value of the property or its marketability. It would be difficult to define with accuracy the exact duties of a vendor as to disclosure.

It is said that a vendor need not draw the purchaser's attention to patent defects but must disclose latent defects. A patent defect was defined in *Yandle & Sons* v. *Sutton*, [1922] 2 Ch. 199, as a defect visible to the eye or arising by necessary implication from something so visible. In *Lowndes* v. *Lane* (1789), 2 Cox Eq. Cas. 363, it was laid down that if a matter is open to observation the Court will at least require a reasonable explanation why it was not observed. As a latent defect was described in *Lucas* v. *James*, 7 Hare 410, as one which a provident purchaser could not discover, it might be thought that a patent defect was one which a provident purchaser *could* discover. This would not, however, be a correct deduction. It would be more correct to say that the defect must be one which a normal person inspecting the property with reasonable care ought to have observed. A purchaser who fails to inspect property cannot complain if it turns out that the property is in a ruinous condition. It is to such cases that the maxim "*Caveat emptor*" applies. But of what must the purchaser "beware"? It is clear that he is not to anticipate fraud; for fraud makes all contracts voidable: *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 346. Thus, if the property be in a ruinous condition the purchaser cannot be held to the contract if the vendor, by deliberately covering or cloaking defects, as by papering over faulty walls, has deceived the purchaser: *Pickering* v. *Dowson* (1813), 4 Taunt., at p. 785. At common law, where there was a latent defect and the property was sold "with all faults", it appears to have been the rule that

the purchaser must take the property as he found it and subject to any latent defects which subsequently appeared, and there are several decisions to that effect. It is clear that these decisions are no longer law so far as concerns any such defect of which the vendor is aware: *Tildesley* v. *Clarkson* (1862), 31 L. J. Ch. 362; *Lucas* v. *James*, 7 Hare 410. Further, if the vendor, being questioned as to defects or other material matters, turns aside the inquiries by evasive or ambiguous replies, the purchaser will not be held to his bargain if a correct answer might well have deterred the purchaser from proceeding with the purchase, and the purchaser alleges that this would have been the effect in his case: *Hill* v. *Gray* (1815), 1 Stark. 434; *Keates* v. *Earl Cadogan* (1851), 10 C. B. 591. "It is the obvious duty of a vendor to make himself fully acquainted with all the peculiarities and incidents of the property which he is going to sell; and when he describes the property for the information of the purchaser, it is his duty to describe everything which it is material to know, in order to judge of the nature and value of the property": *per* Kindersley, V.-C., in *Brandling* v. *Plummer* (1854), 2 Drew. 427. Again, "A vendor should give full information to the purchaser; he ought to state that which, if it is not stated, makes that which he does state ambiguous or misleading": *per* Fry, L.J., in *Re Marsh and Earl Granville* (1882), 24 Ch. D. 11.

On the other hand a purchaser must not bury his head in the sand in imitation of the ostrich. "A purchaser is bound to exercise a reasonable degree of caution, and therefore if there be anything in the representations made by the vendor calculated to excite suspicion or to require explanation or investigation, the purchaser is put on his guard and must bear the consequences if he does not make further investigation": *Clarke* v. *Mackintosh* (1862), 4 Giff. 134. So if a purchaser, not satisfied with the representations made by a vendor, investigates the truth of them, and has a fair opportunity of testing their accuracy, he cannot after contract obtain relief on the ground of misrepresentation: *ibid.* Moreover, it is not the duty of the vendor to give to the purchaser the benefit of his special knowledge of the market value of the property, even if he has recently obtained a valuation for his own guidance (*Abbott* v. *Sworder* (1852), 4 De G. & Sm. 448); or to disclose that his tenant has complained that the rent is excessive and has not in fact paid the full rent: *ibid.*

*Puffing.*

Some latitude in the matter of adjectival commendation of the property is permitted to the vendor. One man's poison may

be another man's meat. What is highly objectionable or unsightly according to A may be "highly attractive" to B, and therefore a certain degree of freedom of description is justifiable. If it is borne in mind that the purchaser is, *prima facie*, deemed to have inspected the property it is not difficult to accept as correct the majority of the decisions as to "puffing" statements. It will, however, be appreciated that in many cases it is a question of degree or of the special circumstances of the case. Thus, if a newly built house is described as "well-built", this description must be judged according to prevailing standards of construction of houses of that particular class at the present time. On the sale by a builder of land with a house in course of construction or to be constructed upon it there is, of course, a warranty that the house shall be erected in an efficient and workmanlike manner and with proper materials: *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K. B. 83; *Lawrence* v. *Cassel*, [1930] 2 K. B. 83. (But as to personal injury arising from defects of construction, see and compare *Bottomley* v. *Bannister*, [1932] 1 K. B. 458, and *Otto* v. *Bolton and Norris*, [1936] 2 K. B. 46.)

The following descriptions have been held to be mere "puff" and not actionable misrepresentations:—

(1) House described as "substantial and convenient": *Johnson* v. *Smart*, 2 Giff. 151. But if there is some substantial defect in the structure known to the vendor the description of the house as "substantial and well-built" is not mere puff, but is misrepresentation: *Cox* v. *Middleton* (1854), 2 Drew. 209.

(2) "Fit for a respectable family"; but if in addition the property is described by reference to a plan which indicates that there are trees and shrubs in a certain position this goes beyond puff, and is a misrepresentation: *Magennis* v. *Fallon* (1829), 2 Mol. 561 (Ir.).

(3) "Uncommonly rich water meadow".—Where the land could be called water meadow, although imperfectly watered: *Scott* v. *Hanson* (1829), 1 Russ. & M. 128. This case seems only to be an authority for the statement that the contract could not be repudiated by the purchaser. If the vendor employs in the description words which necessarily imply that the property or land has received certain treatment, this will not be mere puff. Thus "in a high state of cultivation" implies that the land has in fact been cultivated, and if it has been neglected there is a misrepresentation: *Dyer* v. *Hargrave* (1805), 10 Ves. 505.

(4) "Worth" a stated amount (*Harvey* v. *Young* (1602), Yelv. 21; 80 E. R. 15); or "of the estimated annual value of ——" : *Re Hurlbatt and Chaytor* (1888), 57 L. J. Ch. 421. In the last-mentioned case the purchaser was refused compensation, although he was able to produce strong evidence to show that the estimate was too high. In such cases the purchaser cannot succeed unless he can show fraud, *i.e.*, by establishing not only that the estimate was too high, but that it was so high that no reasonable person possessing the vendor's knowledge could honestly have put forward such an estimate.

(5) "Fertile and improvable".—"I think that a mere general statement that land is fertile and improvable, whereas part of it has been abandoned as useless, cannot, except in extreme cases, as, for instance, where a considerable part is covered with water, or otherwise unclaimable, be considered such a misrepresentation as to entitle a purchaser to be discharged. In the present case I think the statement is to be looked at as a mere flourishing description by an auctioneer": *per* Turner, L.J., in *Dimmock* v. *Hallett* (1866), 2 Ch. App. 21.

It is well when considering cases dealing with laudatory descriptions of property (particularly the earlier decisions) to remember that results may differ according to whether the matter in issue is specific performance or an action by the purchaser at common law.

The following descriptions have been held to be or to involve representations going beyond mere commendation or puff:—

(1) "Not damp": *Strangways* v. *Bishop* (1857), 29 L. T. (o.s.) 120. The absence of the adjective from the description is significant. The question of dampness or dryness is one which is susceptible of ready proof. It is a simple question of fact and not of "fulsome praise".

(2) "Has lately undergone thorough repair": *Noyes* v. *Rutherford*, Sug. 331. This again is a clear representation of fact.

(3) "Brick-built": *Powell* v. *Doubble*, Sug. 29.

(4) "Let to a most desirable tenant": *Smith* v. *Land Corporation* (1884), 28 Ch. D. 7. In this case it was shown that the tenant was too impecunious to pay the rent and that the vendor was aware of that fact.

(5) "Clears a net value of £90 per annum": *Shirley* v. *Stratton* (1785), 1 Bro. C. C. 440. This is a misrepresentation if the repairs amount every year to about half the

stated value. Estimates of value, whether stated in the form "Worth £——" or "Estimated to produce £——", are mere puff although the figure given is excessive. If, however, the figure is so excessive that it is impossible to suppose that it was an honest estimate, then this is no mere puff but fraud. For "a man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. . . . A man who thus acts must have a wicked mind": *per* Lord Esher in *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491. "But negligence, however great, does not of itself constitute fraud": *ibid.* Further, if an opinion as to value or otherwise is expressed by an expert and the vendor repeats it accurately, this would be no misrepresentation: *ibid.*

(6) "First-rate building plot": *Dykes* v. *Blake* (1838), 4 Bing. N. C. 463. As to the suitability of land or buildings for any particular purpose, the purchaser must judge for himself. This rule applies equally where a lease of unfurnished premises is being taken (apart from statutory provisions affecting houses for the working classes): *Cheater* v. *Cater*, [1918] 1 K. B. 247. If, however, the vendor states that the property is suitable for some special purpose and it is in fact quite unsuitable for that purpose, owing to the existence of a right of way over it, the purchaser, if unwilling to accept compensation, may repudiate the contract: *Dykes* v. *Blake* (*supra*). In that case the conditions of sale gave notice of certain documents which would have revealed the right of way if the purchaser had examined them, but there was no express mention of the right of way in the particulars or in the conditions. Another condition provided that any mistake in the description or any other error should not annul the sale, but that compensation should be awarded. This decision, therefore, forms a good illustration of the rule that special conditions which do not sufficiently disclose the defect which is intended to be covered, or general conditions, will not be effective to qualify or contradict the particulars given in the description of the property. It is the duty of the vendor to disclose any incumbrance or liability of which he is aware or has the means of knowing: *Nottingham, etc., Tile Co.* v. *Butler* (1886), 16 Q. B. D. 778.

(7) "Suitable for development": *Baker* v. *Moss* (1902), 66

J. P. 360—land filled in with refuse and unfit for building purposes without incurring substantial expense in digging out the refuse and filling in with suitable material. In such circumstances the property could not be correctly described as being suitable for development, *i.e.*, in its present state. But it has been held that where property is correctly described as "well-drained" the purchaser cannot escape from his bargain on the ground that the drainage work has not been paid for, it being his duty to inquire whether any payment was involved: *Ward* v. *Moss* (1867), 16 L. T. 91.

(8) "Valuable business premises": *Hunt (Chas.), Ltd.* v. *Palmer*, [1931] 2 Ch. 287. Leasehold property was held under a lease which limited the user to the making and sale of ladies' clothing and a fancy draper's business. The description was held to be misleading, specific performance refused and the return of the deposit ordered: see *The Conveyancer*, Vol. I, pp. 310—311.

(b) *Misrepresentation.*

The onus of proof of misrepresentation rests upon the purchaser; but if the misrepresentation is established the onus is then upon the vendor to show that the purchaser did not rely upon the representation: *Torrance* v. *Bolton* (1872), 8 Ch. App. 118; *Colby* v. *Gadsden* (1867), 17 L. T. 97. The essence of any claim for compensation or rescission of the contract is that the purchaser has been misled. If, therefore, he has discovered the mistake in the particulars or in the draft contract before the agreement for purchase is entered into he has not been misled, and has therefore no claim: *Lysney* v. *Selby* (1705), 2 Lord Raymond 1118.

*Rescission or compensation under an open contract.*

I.—Where there is a material misrepresentation and it is impracticable to measure the compensation, the Court will not order specific performance at the instance of the vendor: *Brooke* v. *Rounthwaite* (1846), 5 Hare 298; *White* v. *Cuddon* (1842), 8 Cl. & Fin. 766. In such cases (*e.g.*, where there are restrictive covenants affecting the land) the purchaser must either rescind the contract or take the property without compensation: *Rudd* v. *Lascelles*, [1900] 1 Ch. 815.

II.—If, however, the mistake or deficiency is such that compensation can be estimated, then—

(a) If the mistake or deficiency does not amount to a

substantial misdescription the purchaser or the vendor may enforce specific performance, the vendor being obliged (in either case) to allow proper compensation to the purchaser (*Shepherd* v. *Croft*, [1911] 1 Ch. 521); but the purchaser cannot rescind the contract: *Re Brewer and Hankins' Contract* (1899), 80 L. T. 127.

(b) If the error is such that the purchaser will not be getting substantially what he has bargained for in the contract, then the position is as follows:—

(i) The purchaser can insist that the vendor should convey to him the property or interest to which the vendor can show title, the purchaser receiving compensation for the deficiency unless third parties will be prejudiced or great hardship to the vendor involved: *Willmott* v. *Barber* (1880), 15 Ch. D. 96; *Thomas* v. *Dering* (1837), 1 Keen 729; *Hooper* v. *Smart* (1874), L. R. 18 Eq. 683; *Rudd* v. *Lascelles*, [1900] 1 Ch. 815. Alternatively, the purchaser may, if he so elects, repudiate the contract: *Flight* v. *Booth* (1834), 1 Bing. N. C. 370; *Jacobs* v. *Revell*, [1900] 2 Ch. 858, and cases cited in previous pages of *The Conveyancer*, *e.g.*, Vol. I, pp. 304—310.

(ii) If the vendor seeks specific performance the Court will not make the order sought: *Flight* v. *Booth* (*supra*).

*Hardship.*

Generally, the difficulty is that what the vendor can sell is something less beneficial than the property described in the contract. It may, however, happen that the property so described is more extensive than that which the vendor intended to sell. Whether the misdescription is serious or not a vendor can only claim specific performance upon the terms that he conveys the whole of the property in the contract *without any allowance by the purchaser*: *Manser* v. *Back* (1848), 6 Hare 443; *Alvanley* v. *Kinnaird* (1849), 2 Mac. & G. 1. If, however, the purchaser sues for specific performance, and the property included by the vendor's mistake is of so substantial an area or is of such value that it would involve great hardship to the vendor, the Court will not decree specific performance unless the purchaser is willing to limit the assurance to the property which the vendor intended to include in the sale and to waive any claim to compensation: *ibid.*, and see *Neap* v. *Abbott* (1837), C. P. Cooper 333.

It will be appreciated that the case with which we are now dealing is not one in which there is a mutual mistake. If the

written contract does not represent the true bargain the remedy is rectification: *Joynes* v. *Statham*, 3 Atk. 388; *Gwynn* v. *Lethbridge*, 14 Ves. 585; *McKenzie* v. *Hesketh*, 7 Ch. D. 675. Therefore, where the mistake made by the vendor is not substantial the Court will, as stated above, decree specific performance of the contract without variation or compensation in favour of the vendor. Further, although the Court may on the ground of hardship to the vendor refuse to order specific performance at the suit of the purchaser, it would obviously be inequitable to the purchaser to refuse to him some measure of damages for the breach of the contract. It must not be understood that the damages awarded will represent the difference in value between the subject-matter of the sale as appearing in the contract and that which the vendor intended to sell. If this were so the relief afforded to the vendor would be merely nominal. The damages recoverable by the purchaser are only the expenses which he has incurred in connection with the purchase, *i.e.*, the deposit with interest thereon (usually at 4 per cent. per annum), and the expenses in connection with the contract and investigation of title. For this purpose the rule which applies this measure of damages is that originally established in *Flureau* v. *Thornhill* (1776), 2 W. Bl. 1078, but now known as the rule in *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158, as to which see *The Conveyancer*, Vol. I, p. 119 and pp. 305—307. Expenses incurred by the purchaser in connection with a sub-sale are not recoverable unless it was within the contemplation of both parties at the date of the contract that a contract for re-sale would be effected before completion of the original purchase: *Spedding* v. *Nevell* (1869), L. R. 4 C. P. 212.

*Compensation.*

It will have been observed that apart from any express condition of sale the Court may award compensation to the purchaser in respect of any deficiency. If, however, a condition permitting compensation in respect of any deficiency, misdescription or error is contained in the contract the purchaser can claim compensation if, after completion of the purchase, he discovers that the particulars of the property are incorrect. In such a case there is no merger of the contract in the conveyance, as a provision for compensation is no part of the ground covered by a conveyance: *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, dissenting from *Manson* v. *Thacker* (1878), 7 Ch. D. 620, *Besley* v. *Besley* (1878), 9 Ch. D. 103, and *Allen* v. *Richardson* (1879), 13 Ch. D. 524, and following *Cann* v. *Cann* (1830), 3 Sim. 447 and *Bos* v. *Helsham* (1866), L. R. 2 Ex. 72.

In the absence of a condition providing for compensation the purchaser will not be entitled (in the absence of fraud or an express or implied warranty as to some particular matter) to obtain compensation after completion of the purchase.

In order to obtain compensation the purchaser must show either a misrepresentation of fact or an error of description. Thus if the vendor, in reply to an inquiry whether the property is in good repair, honestly replies "I believe so", there is no misrepresentation even if it is shown later that the property is seriously affected by dry rot: cp. *Lucas* v. *James* (1849), 7 Hare 410.

See further on this point the remarks of Farwell, J., in *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E. R. 739, under "Warranty", *infra*.

In *Re Hurlbatt and Chaytor* (1888), 57 L. J. Ch. 421, the vendor stated that the estimated value of the property was £400 per annum. Convincing evidence was furnished that a more correct estimate was £200 per annum. In spite of a compensation clause in the contract the purchaser was refused compensation, the estimate apparently being honest, though very mistaken.

On the other hand, a condition referring to errors or misstatements and either allowing or refusing compensation will not be effective in respect of intentional mistakes or misrepresentations made with the object of inducing the purchaser to enter into the contract: *Norfolk* v. *Worthy* (1808), 1 Camp. 337; *Stewart* v. *Alliston* (1815), 1 Mer. 26. As Lindley, L.J., said in *Re Terry and White's Contract* (1886), 32 Ch. D. 14, conditions precluding the purchaser from objecting to errors will not enable a vendor to obtain specific performance if he has materially misled the purchaser, and a less serious misleading will enable the purchaser to resist specific performance than would be required to enable him to rescind the contract. He added that however clear a contract may be in its language it may be rescinded for fraud or material misrepresentation, notwithstanding a condition that no error or misstatement should annul the sale but should be the subject of compensation: cf. *Robinson* v. *Musgrove* (1838), 8 C. & P. 469. *Leslie* v. *Tompson* (1851), 9 Hare 268, must be treated as overruled.

A statement in the contract that the purchaser shall not object to *complete the purchase* on account of a deficiency (or presumably any other error) does not preclude the purchaser from requiring compensation in respect of such deficiency: *Frost* v. *Brewer* (1839), 3 Jur. 165. Further, if the error is so substantial that the property to which the vendor can show title is not substantially what the purchaser agreed to purchase specific performance will

not be decreed: *Flight* v. *Booth* (1834), 1 Bing. N. C. 370; *Re Arnold* (1880), 14 Ch. D. 270, and see *The Conveyancer*, Vol. I, pp. 304—310. For no condition is effective to enable the vendor to enforce the contract in such a case. Thus, if the vendor agrees to sell a freehold property but can only show title to a life interest, a condition stating that compensation is to be accepted in respect of errors will not enable the vendor to enforce specific performance: *Ex p. Riches* (1883), 27 S. J. 313. Apart from mistake or misrepresentation in the contract itself the right to compensation may arise from an independent representation by the vendor or his agent, *e.g.*, that the property is in good repair: *Grant* v. *Munt* (1815), Coop. G. 173.

If the contract contains a condition permitting compensation for mistakes or errors the purchaser is not released from the contract by an error which is obvious upon inspection of the property, unless it is shown that the misdescription was intended to mislead the purchaser: *Wright* v. *Wilson* (1832), 1 M. & R. 207; *Norfolk* v. *Worthy* (1808), 1 Camp. 337; *Stewart* v. *Alliston* (1815), 1 Mer. 26.

*Measure of compensation.*

If the property does not comply with the description in the contract or the particulars, then, in the absence of any condition, or where there is a condition permitting compensation, the measure of damages is the difference between the value of the property if it conformed to that description and its value as it stands, and not the cost of putting it into such a condition as will comply with the description: *Re Chifferiel* (1888), 40 Ch. D. 45. In that case it was represented that the road on which the property abutted was made up, and the cost of making up the *whole road* would have exceeded the value of the property sold, even if the road had been made and the expense thereof paid. The true loss was therefore to be determined by ascertaining what the property would realise if sold whilst the road was still unmade.

*Substantial misdescription.*

The term "substantial" misdescription (sometimes called "essential" misdescription) is here used as meaning a misdescription or misrepresentation which goes to the root of the bargain and enables the purchaser, if he so desires, to rescind the contract.

The following are examples of cases in which misdescription has been held to be substantial in this sense:—

(1) Property stated to be enclosed by a rustic wall with a side entrance. The wall did not pass with the property

and the entrance was only held on sufferance. (A condition that mistakes or errors should not annul the sale but compensation should be given held not to prevent rescission by the purchaser): *Brewer* v. *Brown* (1884), 28 Ch. D. 309; cf. *Wood* v. *Keep* (1858), 1 F. & F. 331.

(2) False representation by agent as to an offer to take a lease of the property at a certain rent: *Mullens* v. *Miller* (1882), 22 Ch. D. 194; cf. *London County Freehold, etc., Ltd.* v. *Berkeley Property, etc., Ltd.* (1936), 155 L. T. 190.

(3) Property not "within a ring fence" as stated: *Dyer* v. *Hargrave* (1805), 10 Ves. 505.

(4) Property described as "58 Pall Mall opposite Marlborough House". It was not in Pall Mall but behind 57 Pall Mall, being approached by a long passage through No. 57: *Stanton* v. *Tattersall* (1853), 1 Sm. & G. 529. This case is to be distinguished from *White* v. *Bradshaw* (1851), 16 Jur. 738, where the property was correctly described as "39 Regency Square, Brighton" (although it did not front upon that square), no other representation being made, and the contract was held to be binding on the purchaser.

(5) Vendor represents that land is fit for building purposes. In fact, owing to an underground culvert, it is unsuitable for building: *Re Puckett and Smith*, [1902] 2 Ch. 258. But the existence of an underground watercourse will not enable a purchaser to rescind if, owing to its position and the nature of the intended user of the property, the purchaser will, nevertheless, be getting substantially what he has agreed to purchase, although compensation may be awarded in suitable cases: *Shepherd* v. *Croft*, [1911] 1 Ch. 521; *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56; *Re Brewer and Hankins' Contract* (1899), 80 L. T. 127.

(6) Very incomplete statement of trades prohibited by lease (*Flight* v. *Booth* (1834), 1 Bing. N. C. 370), or failure to disclose that part of property sold as leasehold was held under a separate lease at an additional rent: *Dobell* v. *Hutchison* (1835), 3 Ad. & El. 355. In both of these cases a condition providing for compensation for errors was ineffective.

(7) Property not of the tenure described in the contract: *Madeley* v. *Booth*, 2 D. & S. 718; *Ayles* v. *Cox*, 16 Beav. 23.

(8) Property affected by restrictive covenants: *Cato* v. *Thompson*, 9 Q. B. D. 616.

(9) Very substantial deficiency, particularly where the missing part is of importance to the enjoyment of the whole: *Jacobs* v. *Revell*, [1900] 2 Ch. 858; *Re Arnold*, 14 Ch. D. 270.

(10) Material rights over the property enjoyed by third parties and not disclosed by the vendor: *Peers* v. *Lambert*, 7 Beav. 546; *Shackleton* v. *Sutcliffe*, 1 D. & S. 609.

On the other hand the following were held not to be substantial matters, but suitable for adjustment by compensation:—

(1) Deficiency in extent of property where the missing part was not important to the remainder of the property: *King* v. *Wilson*, 6 Beav. 124; *Re Fawcett and Holmes*, 42 Ch. D. 150.

(2) Yearly rent (if small): *Halsey* v. *Grant*, 13 Ves. 73.

(3) Easement not substantially affecting the enjoyment of the property: *Shepherd* v. *Croft*, [1911] 1 Ch. 521; *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56; *Re Brewer and Hankins' Contract* (1899), 80 L. T. 127.

Where a "substantial misdescription" has occurred it makes no difference whether there is (a) no condition, (b) a condition refusing compensation, (c) a condition permitting compensation. The purchaser is nevertheless entitled to rescind the contract.

The purchaser may, however, be prevented from rescinding and recovering the costs of investigating the title by virtue of the usual condition which provides that if the purchaser shall not withdraw his requisition or objection within a specified period after notice by the vendor then the vendor may rescind the contract and return to the purchaser his deposit, but without interest or compensation. The result of such a condition is that in practically all cases of innocent misrepresentation or error on the part of the vendor the purchaser will be unable to recover the costs incurred by him in connection with the contract and the investigation of title. If the purchaser discovers that the vendor has no title at all, or so serious a deficiency or misdescription that the purchaser could not be required to complete the purchase *unless the matter is remedied*, then the purchaser is in a dilemma. Even if the vendor has no title at all he may be able to obtain one. It is true that according to many of the older decisions a purchaser may, on discovering that the vendor has no title at all to the property, rescind without waiting for the date for completion: *Bowman* v. *Hyland*, 8 Ch. D. 588; *Weston* v. *Savage*, 10 Ch. D. 736; *Brewer* v. *Broadwood*, 22 Ch. D. 105. Having regard to later authorities,

it seems extremely doubtful if the purchaser can *safely* take such a course. For if by the date fixed for completion the vendor has acquired a title or put his title in order the purchaser may not only have to complete the purchase but, according to the view expressed by the late Lord Parker (then Mr. Justice Parker), may also be liable to the vendor in damages for breach of contract if not ready and willing to complete at the due date: *Halkett* v. *Dudley*, [1907] 1 Ch., at p. 599; and see *per* Lindley, L.J., in *Bellamy* v. *Debenham*, [1891] 1 Ch. 421, to the like effect (Lopes, L.J., *dubitante*); *Re Hucklesby and Atkinson's Contract*, 102 L. T. 214; *Stickney* v. *Keeble*, [1915] A. C. 386; *Procter* v. *Pugh*, [1921] 2 Ch. 256 (following *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54); *Day* v. *Singleton*, [1899] 2 Ch., at p. 327; *Wilde* v. *Fort*, 4 Taunt. 334. Further, if the purchaser decides to rescind, believing that the vendor cannot carry out the contract, or because the vendor cannot show definitely that he will be able to perform the contract by the date fixed for completion, and persists in his refusal to proceed with the purchase, although the vendor informs him before completion that he can now carry out his obligations under the contract, he will be unable to recover not only the costs of the contract and of investigation of title but also the deposit itself: *Smith* v. *Butler*, [1900] 1 Q. B. 694. In that case Romer, L.J., said that where the vendor has not the title which he professed to have and has not the legal means then available to complete the contract, "the purchaser is entitled at once to treat the contract as at an end because the vendor cannot ask the purchaser to wait on the chance that the former may acquire the property". See, in the same decision, the four examples given by Romer, L.J., of cases in which the vendor cannot require the purchaser to wait till the date fixed for completion before rescinding. Actually they are all cases in which the purchaser can establish at least a reasonable presumption that the vendor will be unable to fulfil his obligations by the date fixed for completion. On the other hand, if the purchaser does not immediately rescind but presses his requisition that the title be put in order, or negotiates with the vendor with the object of getting the title put in order, one of two things may happen. The vendor may exercise his power of rescission or the purchaser may be held to have lost his right to rescind, as in *Hoggart* v. *Scott*, 1 Russ. & M. 293. If the vendor rescinds the purchaser will be unable to recover his costs of investigating the title: *Re Deighton and Harris*, [1898] 1 Ch. 458; *Procter* v. *Pugh*, [1921] 2 Ch. 256. If the vendor puts his title in order meanwhile and the purchaser has still not rescinded or has continued negotiations with the vendor, then, although the

completion date may have passed specific performance may be decreed: *Salisbury* v. *Hatcher* (1842), 2 Y. & C. (C. C.) 54; *Hoggart* v. *Scott* (*supra*).

It would appear in the present state of the authorities that the best course which a purchaser can pursue, if the vendor appears to be unable to perform his contract, is to state that without prejudice to his right to rescind he is prepared to consider any proposal which the vendor has to make with a view to remedying his title, or making good the deficiency (or as the case may require). He must, however, also deliver his requisitions or objections within the time limited by the contract; and the vendor will thus be able to exercise his right of rescission, and to avoid payment of the purchaser's costs of investigation.

Thus, it would seem that the purchaser can only rescind with safety in cases where there has been fraud by the vendor, or where it is certain not only that the vendor will be unable to put matters in order by the date fixed for completion but also that the defect of title, misdescription, deficiency, or other error is so serious that the Court will not enforce specific performance (even with compensation), and will not award damages to the vendor. Such cases seldom occur, but apart from fraud, where no condition will assist, it would seem that the vendor could be protected by a statement in the common form rescission condition that any purported rescission by the purchaser prior to the service of the vendor's notice should become void on service of the vendor's notice. Although it is submitted that such a change would be unfair to the purchaser it must be admitted that, in general, it would make but little difference. However serious the objection, it is practically always embodied in the requisitions on title, because the contract makes it necessary to deliver them within a specified time, and failure to do so may render the purchaser liable to accept such title as the vendor has. It would require a certain degree of courage to rescind the contract when delivering or before delivering requisitions, without hearing what reply the vendor had to make.

See further on this question *The Conveyancer*, Vol. I, pp. 24, 25, pp. 240, 241, 250—260, and *Head's Trustees* v. *Macdonald* (1890), 45 Ch. D. 310; *Halifax, etc., Banking Co., Ltd.* v. *Wood* (1898), 79 L. T. 536; *Re Hailes and Hutchinson's Contract*, [1920] 1 Ch. 233; *Re Judge and Sheridan's Contract* (1907), 96 L. T. 451.

If the purchaser takes out a vendor and purchaser summons with the object of obtaining an order for the return of the deposit and payment of his costs of investigation the vendor

may nevertheless rescind under the common form condition even if it does not refer to intermediate litigation, but only to intermediate negotiation: *Isaacs* v. *Towell*, [1898] 2 Ch. 285.

It should be remembered that if the defect is one relating to conveyance and not to title, *e.g.*, where the vendor has only an equitable title, the purchaser cannot rescind forthwith, but must wait a reasonable time, even beyond the date fixed for completion if time is not of the essence of the contract: *Re Hucklesby and Atkinson's Contract* (1910), 102 L. T. 214; *Hatten* v. *Russell* (1888), 38 Ch. D. 334.

### Misdescription as affecting Specific Performance.

A.—*No condition as to compensation.*

(1) If the vendor has included in the description of the property additional property belonging to him, but which he did not intend to include in the sale, he cannot exclude the additional property and enforce specific performance of the contract in respect of the part which he intended to sell, even on the basis that suitable compensation is made to the purchaser in respect of the additional property, but must convey the whole of the property (as described in the contract) to the purchaser at the price stated in the contract. This rule applies whether specific performance is claimed by the vendor or the purchaser: *Manser* v. *Back*, 6 Hare, at pp. 447-8; *Alvanley* v. *Kinnaird* (1849), 2 M. & G. 1; *Re Orange to Wright*, [1885] W. N. 72; *Tamplin* v. *James* (1880), 15 Ch. D. 215.

This statement of the law is subject to the observations under "Hardship" above, and see section 2 (ii) below.

(2) (i) If, however, the vendor has wrongly described the property which he intends to sell by including property *not* belonging to him and to which he cannot make title, or has misdescribed the property or its qualities, then, if the deficiency or misdescription is not such as materially to affect the subject of the contract, he may enforce specific performance upon giving proper compensation for the deficiency or misdescription: *Calcraft* v. *Roebuck* (1790), 1 Ves. jun. 221; *Shepherd* v. *Croft*, [1911] 1 Ch. 521. He cannot enforce the contract even with compensation to the purchaser if the result would be that the purchaser would not be getting substantially the property which he had agreed to buy: *Flight* v. *Booth* (1834), 1 Bing. N. C. 370.

(ii) In such cases the purchaser is entitled to require specific performance with compensation. "If the vendee chooses to take as much as he can have, he has a right to that, and an abate-

ment" (*per* Lord Eldon in *Mortlock* v. *Buller* (1804), 10 Ves., at p. 315), unless:—

(a) The proper compensation is impossible to assess: *Rudd* v. *Lascelles*, [1900] 1 Ch. 815; *Durham* v. *Legard* (1865), 34 Beav. 611.

(b) Very substantial hardship would result to the vendor, or third parties would be prejudiced: *Thomas* v. *Dering* (1837), 1 Keen 729.

(c) The purchaser knew the true facts at the date of the contract: *Castle* v. *Wilkinson* (1870), L. R. 5 Ch. App. 534.

This rule does not apply to cases where the vendor has made a misrepresentation which induces the contract but the property is correctly described in the contract. Here the purchaser must decide whether he will rescind or take the property without compensation: *Rutherford* v. *Acton Adams*, [1915] A. C. 866; *Durham* v. *Legard* (*supra*).

(3) The vendor may often be able to escape specific performance of the contract with compensation to the purchaser by exercising the right of rescission which is usually reserved to him by the contract: see on this point the following paragraph.

B.—*Condition precluding claims for compensation by either party.*

(1) If there is a condition precluding compensation the vendor can waive the condition and offer compensation to the purchaser in respect of any misdescription or deficiency. If he does not waive the condition he cannot enforce specific performance, even if the misdescription or deficiency is slight, for the Court clearly cannot compel a purchaser to take less than he has agreed to purchase unless compensation is paid to him. If, however, the vendor waives the condition then the position is similar to that which obtains where there is no condition, as to which see A above.

(2) The vendor cannot, however, rescind or enforce specific performance with compensation in his favour or limit the assurance to the property which he intended to sell and give compensation to the purchaser even if he waives the condition. The point is that if he does not waive the condition then the condition itself denies him compensation; if he waives the condition then the rule stated in A (1) above will apply: *Price* v. *North*, 2 Y. & C. Ex. 620; *Re Orange*, [1885] W. N. 72; *Manser* v. *Back*, 6 Hare pp. 447 and 448; *Neap* v. *Abbott*, Coop. C. P. 333; *North* v. *Percival*, [1898] 2 Ch. 128. This rule is subject to the remarks above as to relief from specific performance of the contract on

the ground of unfairness, hardship or mistake (see "Hardship", *supra*).

(3) Such a condition is effective both to prevent the purchaser from rescinding the contract and from resisting specific performance in the case of any non-essential or non-substantial errors or deficiencies: *Cordingley* v. *Cheeseborough* (1862), 4 De G. F. & J. 379.

(4) Even in the case of "substantial" misstatements, errors or deficiencies, the purchaser cannot claim specific performance with compensation (*Cordingley* v. *Cheeseborough*, *supra*; *Re Terry and White's Contract* (1886), 32 Ch. D. 14), but may successfully resist specific performance or may rescind the contract: *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258; *Jacobs* v. *Revell*, [1900] 2 Ch. 858. By a "substantial" mis-statement, error or deficiency is meant one which is so serious that the Court would be prepared to accept the purchaser's contention that he would not have entered into the contract if he had known the true facts (*Flight* v. *Booth* (1834), 1 Bing. N. C. 370), or, as it has been put in other cases, such that the purchaser would not be obtaining substantially what he had agreed to purchase: *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258; *Shepherd* v. *Croft*, [1911] 1 Ch. 521. And see "Substantial misdescription" (*supra*) and section C (1) (*infra*).

Even if the error is not substantial in the technical sense just mentioned, it seems that the Court will not enforce specific performance if the error consists of a shortage of land comprising a substantial percentage of the land described in the particulars of sale or the contract, *e.g.*, a shortage of 100 acres in the case of a contract for sale of 349 acres: *Portman* v. *Mill* (1826), 2 Russ. 570. A similar rule obtains where a good marketable title cannot be deduced to a portion of the land which is essential or of material importance to the enjoyment of the remainder of the land purchased: *Peers* v. *Lambert*, 7 Beav. 546; *Re Arnold*, 14 Ch. D. 270. Cf. and distinguish *Ashton* v. *Wood*, 3 Sm. & G. 436, where there was a special condition enabling the *purchaser* to rescind if objections to title were not removed.

*Phillips* v. *Miller* (1875), L. R. 10 C. P. 420, might appear to be in conflict with the principle that a condition refusing compensation to the purchaser is in all cases effective to debar the purchaser from obtaining compensation, but it would seem that in that case a new arrangement had been made superseding the condition: see L. R. 9 C. P., at p. 204.

In *Whittemore* v. *Whittemore* (1869), 8 Eq. 603, where a vendor claimed specific performance, compensation was allowed to the purchaser for a substantial deficiency. Turner, L.J.,

observed in that case that a condition refusing compensation is "intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements". Since *Re Terry and White's Contract* (1886), 32 Ch. D. 14, this construction of the condition appears to be completely discountenanced: cf. *Re Courcier and Harrold's Contract*, [1923] 1 Ch. 565; *Jacobs* v. *Revell*, [1900] 2 Ch. 858. The true explanation of *Whittemore* v. *Whittemore* (*supra*) is that the purchaser was not the party seeking specific performance. He resisted it except upon the terms that compensation be awarded to him. This case is, therefore, merely an illustration of the fact that the Court may (notwithstanding a condition refusing compensation to the purchaser) in the vendor's suit for specific performance refuse to grant its decree except upon the terms that compensation is made to the purchaser: *Shepherd* v. *Croft*, [1911] 1 Ch. 521. Where damages might fairly compensate the purchaser, he is therefore not entitled to rescind the contract by virtue of such a condition: *ibid.*

(5) Where there is a substantial misstatement, error or deficiency the Court will in general order the return of the deposit and the payment of the costs of the purchase: *Heywood* v. *Mollalieu* (1883), 25 Ch. D. 357; *Jacobs* v. *Revell*, [1900] 2 Ch. 858; *Nicoll* v. *Chambers* (1852), 11 C. B. 996. *Jacobs* v. *Revell* appears to authorise the statement that a condition refusing compensation tends rather to assist the purchaser in obtaining the return of his deposit. Under section 49 of the Law of Property Act, 1925, the Court has a wide discretion as to the return of the deposit: see *The Conveyancer*, Vol. I, p. 310. It is likely that the tendency under this section will be to enlarge the classes of case in which the return of the deposit will be ordered. And see C (2) below.

(6) Rescission by purchaser: see A (4) above.

C.—*Condition permitting compensation for errors or misstatements or deficiencies.*

(1) Either party may enforce specific performance with compensation subject as follows:—

(a) If the vendor is suing for specific performance he cannot succeed if the misstatement was made with fraudulent intent (*Norfolk* v. *Worthy* (1808), 1 Camp. 337); or if the error was "substantial" within the meaning of the rule stated in B (4) above (see the cases there cited); or if compensation cannot be properly assessed: *Flight* v. *Booth* (1834), 1 Bing. N. C. 370; *Rudd* v. *Lascelles*, [1900] 1 Ch. 815; *Cato* v. *Thompson* (1882), 9 Q. B. D. 616; *Cox* v. *Coventon* (1862), 31 Beav. 378. It will be

appreciated that the question whether compensation can be properly assessed may depend upon the purpose to which the purchaser intends to put the land. It is therefore important to point out that it is not incumbent upon the purchaser in such cases to show that he had pointed out to the vendor before contract the purpose to which he intended to put the land: *Knatchbull* v. *Grueber* (1815), 1 Madd. 153; *Magennis* v. *Fallon* (1829), 2 Moll. 561.

(b) If the purchaser seeks specific performance he can obtain it with compensation even if the error is "substantial" in the sense indicated in B (4) above (*Painter* v. *Newby* (1853), 11 Hare 26), except where this would involve substantial hardship to the vendor (see "Hardship" above): *ibid.*

(2) It is clear that a condition providing that compensation shall be made for errors will prevent the purchaser from rescinding in the case of non-substantial errors or misstatements if the vendor is prepared to pay proper compensation. If, however, the error or misstatement is so substantial as to debar the vendor from enforcing specific performance, or if compensation cannot fairly be assessed, the purchaser may prefer to rescind the contract, and if he does so he will be entitled to recover the deposit paid by him and the costs of the purchase: *Flight* v. *Booth* (1834), 1 Bing. N. C. 370. The case is, of course, even stronger where there has been fraud by the vendor: *Norfolk* v. *Worthy* (1808), 1 Camp. 337. And see further on the question of rescission by the purchaser A (4) above.

*Indemnity.*

It seems clear from old authorities that the Court has in certain cases ordered specific performance on the basis that the vendor should indemnify the purchaser against some liability which cannot be discharged, such as a portions term or a perpetual rent (*Horniblow* v. *Shirley* (1806), 13 Ves. 81; *Halsey* v. *Grant* (1806), 13 Ves. 73; *Milligan* v. *Cooke* (1808), 16 Ves. 1); but it would seem that the Court will not make such an order at the present day at the instance of either party: *Re Weston and Thomas*, [1907] 1 Ch. 244. Further, if the loss which the purchaser may suffer cannot be assessed, specific performance with a general indemnity was never decreed: *Brooke* v. *Rounthwaite*, 5 Hare 298; *Westmacott* v. *Robins*, 5 D. F. & J. 390; *Ridgway* v. *Gray* (1849), 1 M. & G. 109; *Fildes* v. *Hooker* (1818), 3 Mad. 193. But if there

is a fund which is available by way of indemnity and such fund is ample to meet the liability, the Court may decree specific performance without compensation or further security: *Bainbridge* v. *Kinnaird* (1863), 32 Beav. 346. It was said by Lord Eldon in *Wood* v. *Bernal* (1812), 19 Ves. 220, that if the incumbrance amounted to half the purchase price the purchaser could not be compelled to accept an indemnity; but since *Re Weston and Thomas*, *supra*, the amount of the liability appears to be of little importance.

It seems to be deducible from the authorities that where the incumbrance is small and the capital amount thereof can be ascertained and discharged the Court will require the discharge of the incumbrance, but will not do so if the amount of the incumbrance is such that substantial hardship would be inflicted if he were required to discharge it: *Rudd* v. *Lascelles*, [1900] 1 Ch. 815, at p. 818. The same observation applies to the statutory provision made by section 50 of the L. P. Act, 1925, which is to the following effect:—

(1) Where land sold is subject to any incumbrance the Court may direct payment into Court of a sufficient sum to meet the liability. If it is a capital sum the sum to be paid into Court will be an amount equal to that capital sum together with such additional amount as the Court thinks sufficient to meet any further costs, expenses and interest and any other contingency (except depreciation of investments) not exceeding one-tenth of the original sum to be paid into Court.

If the liability is an annual sum or a capital sum charged on a determinable interest in land the amount to be paid into Court will be the purchase price of Government securities of an amount sufficient to produce dividends which will keep down the annual sum together with an additional amount to meet further costs and expenses (as above mentioned in the case of a capital liability): sub-section 1.

(2) Upon the payment into Court being made the Court may declare the land to be freed from the incumbrance, and make an order for conveyance or vesting order giving effect to the sale, and give directions for the investment and application of the fund in Court: sub-section 2.

As to "hardship" to vendor disentitling the purchaser to require such payment into Court, see *Re Great Northern Ry. and Sanderson* (1884), 25 Ch. D. 788.

The purchaser cannot be compelled to accept a personal indemnity, even if the liability is a small amount of succession duty the liability for payment of which would only arise many

years after the purchase. The purchaser is in that case entitled to have it discharged: *Re Weston and Thomas' Contract*, [1907] 1 Ch. 244.

It is more difficult for a vendor effectually to set up a plea of hardship where there is a condition permitting compensation in respect of errors or mistakes: *Painter* v. *Newby* (1853), 11 Hare 30. Where there was such a condition the particulars describing the property as containing 1,200 square yards, but the actual area was 935 square yards, the vendors were compelled to complete and to allow compensation notwithstanding a plea of hardship: *Aspinalls to Powell and another* (1889), 60 L. T. 595.

If the usual right of rescission on account of requisitions is reserved to the vendor, it must not be forgotten that he may be able to escape liability to discharge incumbrances or to pay compensation by rescinding the contract.

### Warranty.

It would be out of place here to discuss in detail or to attempt to reconcile the numerous cases in which the distinction between "misrepresentations", "warranties" and "conditions" has been considered. It is, however, necessary to show why the purchaser has in some cases insisted that certain matters have been "warranted" and not that there has been a "misrepresentation". Actually it would seem to matter little as between the parties whether a vendor makes an incorrect statement in the description contained in the contract or in some other manner: yet the results may be very different.

It may be stated as a broad proposition that if the purchaser has completed his purchase he will not be entitled either to recover damages or to repudiate the contract on the ground that the vendor has misrepresented the quality, quantity, value or condition of the property unless he can show that the misrepresentation was fraudulent (*Brownlie* v. *Campbell* (1880), 5 App. Cas. 925), or that there has been a mutual mistake going to the root of the contract: *Hitchcock* v. *Giddings*, 4 Price 135, at p. 141, or that there has been a "warranty" by the vendor.

(a) *Fraudulent misrepresentation.*

The misrepresentation will be fraudulent, for example, if the vendor, knowing of a defect in the title which should be disclosed in the abstract, wilfully fails to mention it in the abstract: *Edwards* v. *McLeay* (1818), 2 Swan. 287.

(b) *Mutual mistake.*

Not all mutual mistakes will enable the transaction to be avoided after completion. Thus, a purchaser might well be able to resist specific performance upon the ground that the parties had contracted in a mutually mistaken belief that the vendor had an estate in fee simple in possession and but for such belief the purchaser would not have entered into the contract. This would not, however, necessarily enable the purchaser to avoid the transaction after completion (*Re Tyrell* (1900), 82 L. T. 675), whatever remedy might be available to the purchaser under express or implied covenants for title entered into by the vendor.

It is thought that the rule may be fairly stated as follows: It must be shown either that the supposed subject-matter of the contract never existed, or that, if it ever existed, it had been destroyed at the date of the contract.

The following are examples of cases in which the mutual mistake is sufficient to enable the contract to be avoided even after completion:—

(a) After the purchase and conveyance of a remainder expectant on an estate tail it is found that the tenant in tail had at the date of the contract already suffered a recovery, so that the remainder is destroyed: *Hitchcock* v. *Giddings* (1817), 4 Price 135.

(b) Before the date of the contract the property purchased has been swept away by flood (*semble*): see *dictum* in *Hitchcock* v. *Giddings* (*supra*), at p. 141.

(c) A agrees to purchase or take a lease of property which is afterwards found to belong to him: *Jones* v. *Clifford* (1876), 3 Ch. D. 779; *Bingham* v. *Bingham* (1748), 1 Ves. sen. 126; *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149.

The fact that the vendor has no title to the property sold may well entitle a purchaser to rescind a contract before conveyance or to resist specific performance: *Durham* v. *Legard* (1865), 34 Beav. 611. It is, however, a very different matter if the purchase has been completed. If the vendor has sold a property wrongly believing that he has a good title thereto, and the purchaser has completed the purchase in the same mistaken belief, the purchaser has no remedy: *Allen* v. *Richardson* (1879), 13 Ch. D., at p. 543.

The cases above mentioned show how difficult it must be for a purchaser to secure the rescission of a contract after completion unless he is able to prove fraud. Assuming that he is unable to rescind the transaction, there remains the possibility that he may be able to recover damages. It is, however, well settled by a long line of cases that whether the claim is made before or after

completion damages cannot be recovered for an innocent misrepresentation: *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925. In *Greswolde Williams* v. *Barneby* (1900), 83 L. T. 708, it was laid down that the conveyance, operating by way of merger, deprives the purchaser of any right to recover damages in respect of all mistakes in the description of the property contained in the particulars or contract for sale. "After the purchaser has taken a conveyance and the purchase money has been paid no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale unless such error amount to a breach of some contract or warranty contained in the conveyance itself or unless some fraud and deceit has been practised upon the purchaser": *Joliffe* v. *Baker* (1883), 11 Q. B. D. 255, *per* Watkin Williams, J.; and see *Brett* v. *Clowser* (1880), 5 C. P. D. 376.

The foregoing observations do not apply if there is an express provision in the contract enabling the purchaser to claim compensation or damages in respect of errors. Such a provision will enable the purchaser to recover damages for errors in the contract or particulars even though the purchase has been completed: *Palmer* v. *Johnson* (1884), 3 Q. B. D. 351. The condition may, however, expressly state that compensation can only be recovered prior to completion: cf. Law Society's Condition 31 (2).

In the passage above cited from *Joliffe* v. *Baker*, Watkin Williams, J., referred to claims made after completion for damages on account of errors and to the necessity for establishing "a breach of some contract or warranty contained in the conveyance itself". The learned Judge's words appear at first to imply that damages cannot be recovered after completion in respect of a breach of warranty unless that warranty is contained in the conveyance itself. This, however, is not the case, and it must not be assumed that his Lordship was intending to refer to errors in respect of matters already warranted by the vendor as a matter of contract.

A consideration of the nature and effect of a warranty will make this clear. "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract yet collateral to the express object of it": *per* Lord Abinger in *Chanter* v. *Hopkins* (1838), 4 M. & W. 399. "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a

condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and be so relieved from performing his part of it, *provided it has not been partially executed in his favour.* If, indeed, he has received the whole, or any substantial part, of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak more properly, perhaps, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, namely, a stipulation by way of agreement for the breach of which a compensation must be sought in damages": *per* Williams, J., in *Behn* v. *Burness* (1863), 32 L. J. Q. B., at p. 206. See to the like effect, *Heilbut* v. *Hickson* (1872), L. R. 7 C. P., at p. 450.

It will be seen from the foregoing authorities that misrepresentation alone (if not fraudulent) will not be sufficient to enable the purchaser *after completion* to obtain damages. It is for this reason that where proceedings are taken by a purchaser after completion for recovery of damages it will generally by found that either fraud or breach of warranty is alleged.

It was formerly laid down that in determining whether a warranty was intended the deciding test was whether the vendor assumed to assert a fact of which the buyer was ignorant or merely stated an opinion or judgment on a matter in respect of which the vendor had no special knowledge and on which the buyer might be expected also to exercise his own judgment: *De Lassalle* v. *Guildford*, [1901] 2 K. B., at p. 221. The House of Lords, in *Heilbut* v. *Symons*, [1913] A. C. 30, considered that these tests were not decisive, although they might be criteria of value when determining whether a warranty was intended were not conclusive. It was observed by Lord Moulton that "the objection to imputing a collateral contract is that this would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter".

In the case of *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E. R. 739, an unsuccessful attempt was made to recover damages by setting up as a warranty matters which at best could only amount to innocent misrepresentations. A purchaser having completed his purchase sued for damages for breach of warranty, relying upon certain misstatements of fact. In the course of his judgment, Farwell, J., after pointing out that the claim was for damages for breach of warranty, said: "A warranty may be defined as a stipulation subsidiary to, or collateral to, a principal contract, a breach of which gives rise to a claim for damages, but a breach of which does not affect the principal contract." It will be noted

that Farwell, J., was dealing with the position as it stood after completion, and must not be understood to have suggested that a breach of warranty was insufficient before completion of the purchase to affect the main contract. Reference to the *dicta* above quoted will make this point clear. His Lordship proceeded: "In order that there may be a warranty, there must be a clear intention on the part of both parties to the principal contract, and it is most essential, in a case of this sort, to distinguish between misrepresentation on the one hand, and warranty on the other. . . . Unless it can be shown on reasonably plain evidence, or be properly inferred from the evidence, that both parties intended that there should be a particular stipulation such as that which I have indicated [*i.e.*, "of a kind which is collateral to the principal contract"] no warranty can be proved and no damages can be recovered for what is no more than an innocent misrepresentation." The following propositions were also laid down by Farwell, J., in *Terrene, Ltd.* v. *Nelson* (*supra*):—

(1) It is always difficult to prove a warranty in the absence of special circumstances. The purchaser must necessarily go to the vendor for information, but he was also bound to make all proper inquiries in view of the doctrine of *caveat emptor.*

(2) If representations made by the vendor were wrong but made in good faith and innocently the purchaser has no claim for damages except in the special cases mentioned by Lord Haldane in his judgment in *Nocton* v. *Ashburton*, [1914] A. C. 932.

(3) If the purchaser asks whether the drains are in order and the vendor answers "Yes", it is difficult to conclude that there is a warranty. If, however, on receipt of this reply, the purchaser then says that he will rely on that reply, and will not have the drains examined because he relies on the vendor's word that the drains are in proper order, then if the vendor indicates tacitly or in words that he is willing that the purchaser shall take that course, then the vendor's original statement is a warranty.

(4) An honest, though very mistaken, estimate given by the vendor "can hardly be a warranty".

(5) The failure of the vendor, when informing the purchaser of an offer which he has received for renting a property, to mention that the offer was made some years ago is not of itself a ground for awarding damages. Nor is (a) an excessive estimate given to the purchaser in respect of the capacity of an electricity generating plant, or (b) the

omission from the particulars of certain outgoings in connection with the property.

The case of *London County Freehold, etc., Properties, Ltd.* v. *Berkeley Property Co., Ltd.*, [1936] 2 All E. R. 1039, however, shows that it is incumbent on the vendor to take care that representations made by his agents are correct. It is well settled in relation to fraudulent misrepresentation that the principal and agent are regarded as one, and if either of them makes a representation which he knows to be false the contract cannot stand, for the principle is that the agent has been put in a position to do a particular class of acts, and the principal cannot escape liability by showing that the agent's fraud was not within his actual knowledge (*Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas., p. 326), even though the act was done for the benefit of the agent: *Lloyd* v. *Grace, Smith*, [1912] A. C. 716 (*e.g.*, solely to enable the agent to qualify for his commission). The *London County Freeholds Case* (*supra*) goes further, and establishes that where agent A knowingly gives false information to B, another agent, and B innocently gives that false information to a purchaser, the principal is liable on the basis that a fraudulent misrepresentation has been made. The representation was that the tenants' rents were being paid promptly, and the purchaser's claim for damages was successful although the purchase had been completed. This decision is also a further authority for the statement that in the absence of evidence that the parties intended a collateral contract no warranty can arise.

(*To be continued.*)

# RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND.

By C. H. S. Preston and G. H. Newsom, of Lincoln's Inn.

(*Continued from p.* 164.)

## IV. Drafting.

1. *Creative words and stipulations.*

A restrictive covenant consists of the stipulations, stating what act or class of acts the covenant prohibits or controls, and the creative words, which give it validity as a covenant, and determine the scope of its enforceability. The present chapter is not concerned with stipulations, which are best considered as an aspect of the matters dealt with in V, "Breach". In drafting restrictive covenants, it is desirable that the stipulations, if at all lengthy, should be relegated to a schedule so that the main body of the conveyance may not be interrupted by them.

### A. *Creative Words of an Ordinary Restrictive Covenant Between Purchaser and Vendor* (*a*).

#### I. *The words of covenant.*

2. *Words of covenant.*

**"The Purchaser** (*b*) **hereby covenants"**

By Law of Property Act, s. 79, it is enacted:—

"(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.

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(*a*) Covenants may also be entered into by a vendor in respect of his retained land, with the purchaser. Again, if a lessor covenants with a lessee in regard to land not included in the demise, his freehold may be bound during the term.

(*b*) It is assumed that under a previous definition in the deed the "Vendor" and "Purchaser" are identifiable persons, but that no elaborate definition has been employed including in the terms persons other than the actual vendor and purchaser.

" (2) For the purposes of this section in connexion with covenants restrictive of the user of land ' successors in title ' shall be deemed to include the owners and occupiers for the time being of such land.

" (3) This section applies only to covenants made after the commencement of this Act."

It is thus unnecessary nowadays to introduce into a covenant words such as " for himself his heirs executors administrators and assigns ". But since the section only applies to covenants relating to land of the covenantor or capable of being bound by him, it must be made clear that the covenants are not to be read as merely personal, but do relate to such land. Accordingly, the binding words later referred to should be inserted in their proper place.

Section 79 only applies, however, to covenants created after 1925, and accordingly in construing covenants created earlier, it will still be necessary to see whether from the presence of such words or otherwise it is plain that the covenantor intended to bind his successors in title.

## II. *Designation of the covenantee.*

3. *The covenantee.*

**" With the Vendor "**

Law of Property Act, s. 78, provides:—

" (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

" For the purposes of this sub-section in connexion with covenants restrictive of the user of land ' successors in title ' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

" (2) This section applies to covenants made after the commencement of this Act, but the repeal of section 58 of the Conveyancing Act, 1881, does not affect the operation of covenants to which that section applied."

Section 78 replaces Conveyancing Act, 1881, s. 58, which made similar provision adapted to the law of devolution then in force.

Considerations exactly similar to those already stated in connection with the words of covenant and section 79 apply here also. The fact that the covenant relates to land of the covenantee will be indicated by the words of annexation later referred to.

### III. *The binding words.*

4. *The binding words.*

**"To the intent that the burden of this covenant may run with and bind the land hereby conveyed and every part thereof."**

As explained above, the binding words are necessary to make plain the intention that the covenants relate to the land of the covenantor, and are not merely personal.

Where the covenantor is the purchaser there will be no difficulty in identifying the land bound, since such land is normally the subject-matter of the conveyance, and is accurately defined elsewhere therein.

In creating covenants at the present day no further binding words are necessary. But in construing old covenants the intention to bind the land and the definition of the land bound may often have to be collected from the use of more prolix and less definite forms of words.

### IV. *The words of annexation.*

5. *The words of annexation.*

**"And to the intent that the benefit thereof may be annexed to and run with**

**(i) the land of the Vendor coloured pink on the plan drawn hereon and every part thereof;**

*or* **(ii) each and every part of the land of the Vendor adjoining or near [or adjacent] to the premises hereby conveyed;**

*or* **(iii) each and every part of the Vendor's Dale Estate remaining unsold at the date hereof;**

*or* **(iv) such part or parts of the Vendor's Dale Estate as shall for the time being remain unsold by the Vendor or other the owner or owners for the time being thereof claiming under the Vendor otherwise than by a conveyance or conveyances on sale or as shall from time to time have been sold by the Vendor or any other person or persons claiming under him as aforesaid with the express benefit of this covenant."**

Unless the intention is that no one save the original covenantee shall be able to enforce, or in building scheme cases (which are here dealt with separately), restrictive covenants should invariably be *annexed* to the protected land: their subsequent enforceability should not be allowed to depend on a chain of express assignments

under the rules in *Miles* v. *Easter*, [1933] Ch. 611. If there is annexation, the benefit of the covenant passes upon a conveyance of the protected land as an appurtenance, irrespective of whether either party to the conveyance has any knowledge of its existence: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388. Such a covenant, therefore, is likely to continue enforceable much longer than one liable to extinction by a single breach in the series of assignments.

6. *Annexation to whole.*

Further, it is undesirable that the covenant should be annexed to the whole and only to the whole of the protected land: see the discussion of *Re Ballard's Conveyance*, [1937] Ch. 473, and *Zetland* v. *Driver*, [1937] Ch. 651; [1939] Ch. 1, in II, § 9. Whatever the protected land may be, the annexation should be to each and every part of it.

7. *Annexation to every part.*

On the other hand, such a covenant has disadvantages, when applied to pieces of land sold off from big estates. The object of the vendor in imposing the covenant is to protect his estate, or such of it as remains from time to time, in the hands of himself or his family or persons buying from him pieces of ground large enough to be substantially the whole estate. He does not intend to give to every purchaser of a small plot a right to enforce the covenants; for if that were so, the small owner and the estate owner would have a co-equal position of control, since both alike would have to grant every licence to depart from the covenants. This difficulty can be met by the insertion of an overriding power for the owner of the named estate to waive or vary the stipulations. Such a power would not, however, survive the break-up of the estate.

Form (i) is to be recommended wherever it is at all practicable, as being by far the most precise. If the vendor's estate is large, it will be worth considering whether it is necessary or desirable to annex the covenant to all of it. It will often be more satisfactory to annex it only to an area comparatively near to the land restricted; but every annexation should, of course, be to every part of the land protected however small.

Form (ii) is, in effect, the covenant in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388. It is appropriate to the case where the vendor has no named estate, and does not desire to limit the scope of the covenant as in form (i). The form, however, involves a complicated inquiry as to the protected land in any subsequent

litigation: see *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430.

The exact scope of the various possible adjectives is difficult to define. "Adjoining" by itself means primarily having physical contact: *Ind, Coope* v. *Hamblin*, 84 L. T. 168, following *Vale* v. *Moorgate, etc.*, 80 L. T. 487, and *R.* v. *Hodges*, 1 Moo. & M. 341; *Harrow* v. *Marylebone District Property Co.*, 86 L. T. 4. But in *Cave* v. *Horsell*, [1912] 3 K. B. 533, a majority of the Court of Appeal found a context to bring the next-door house but one within the expression. This decision stands alone, and it has been doubted whether it is of general application: see *Derby Motor Cab Co.* v. *Crompton*, 57 S. J. 701. "Adjacent" does not require physical contact: *Mayor of Wellington* v. *Mayor of Lower Hutt*, [1904] A. C. 773, at p. 775. In *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430, both words were used; Luxmoore, J., said, at pp. 440-1, the word "adjoining" in its primary sense "of necessity . . . connotes contiguity", while "adjacent" when used in contradistinction to "adjoining" means that which lies near, but is not actually contiguous. Similarly, the words "adjoining or near to" used in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, comprise both land which actually touches, and land which does not. And even "adjoining or contiguous" may include land not actually touching: *Haynes* v. *King*, [1893] 3 Ch. 439. In that case, however, the two pieces of land were separated only by a roadway, and in default of evidence to the contrary the soil of the road was deemed to belong to the opposite owners *usque ad medium filum* (*c*). "Contiguous" by itself, of course, primarily means "touching": *Spillers, Ltd.* v. *Cardiff (Borough) Assessment Committee and Pritchard*, [1931] 2 K. B. 21. In words of annexation, therefore, the word "adjoining" should not be used without other words to extend the meaning of the expression.

Form (iii) is also less satisfactory than form (i). It is appropriate where the vendor has a named estate. It is an adaptation of the covenant employed in *Re Ballard's Conveyance*, [1937] Ch. 473, introducing the words "each and every part", which were relied on in *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.), to distinguish the covenant in that case from that in *Re Ballard*. This form, however, will make it necessary for the plaintiff in the action to establish, as was done in *Zetland* v. *Driver*, (a) what the vendor's Dale estate is, and (b) what were the parts of it

(*c*) As to "opposite", see *Patching* v. *Dubbins*, 23 L. J. Ch. 45, where the land restricted was that on the east side of a terrace "opposite" the land conveyed. That definition meant a strip of width equal to that of the land conveyed.

"touched and concerned" by the covenant (*d*). In both those ways the expense of the action will be greater than if form (i) is employed.

Form (iv) is an adaptation to the case of a vendor absolutely entitled of the covenant in *Zetland* v. *Driver*, which was framed for settled land. It appears from the reports of that case that where land is once sold with the express benefit of the covenant, such benefit will be annexed to the land so sold, and will thereafter pass as an appurtenance of it.

### V. *The matter covenanted.*

8. *The matter covenanted.*

(a) **"To observe the stipulations contained in the Schedule hereto."**

The practice has long been that simpler language may be used in the Schedule than in the body of the deed.

9. *Covenants of indemnity.*

**[(b) "And to observe and perform the covenants contained in a deed dated the —— day of —— and made between —— and —— so far as the same are still enforceable."]**

It is unnecessary to preface such a covenant by a statement that it is by way of indemnity only (as was done in *Re Poole and Clarke's Contract*, [1904] 2 Ch. 173), because a covenant of this kind will be construed in any case as a mere covenant of indemnity: *Reckitt* v. *Cody*, [1920] 2 Ch. 452. The latter was a very strong case: Eve, J., held such a covenant to be one of indemnity, notwithstanding that the then vendor retained contiguous land, and the then purchaser purported to bind the land conveyed.

### VI. *Exclusion of personal liability of covenantor who has parted with the land restricted.*

10. *Exclusion of personal liability.*

**"Provided that neither the Purchaser nor his personal representatives shall be liable for any breach of such stipulations committed upon any part of the land hereby conveyed after**

(*d*) The Court is willing in this way to define the ambit of a restrictive covenant although in regard to covenants in restraint of trade, for example, a somewhat different view prevails: "It would in my opinion be *pessimi exempli*, if when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance and by applying their ingenuity and knowledge of the law carve out of this void covenant the maximum of what he might have validly required": *per* Lord Moulton, in *Mason* v. *Provident Clothing Co.*, [1913] A. C. 724, at p. 745.

**he or they have parted with all interest in (*or* possession of) the said land or such part thereof."**

This proviso is very commonly inserted, but its scope is in fact somewhat limited. For this purpose covenants may be considered to be of three kinds : (a) *Warranties*, that neither the covenantor nor other persons shall do certain acts. Covenants for title are of this kind, but covenants as to user are not usually construed as such; it is extremely difficult to persuade the Court to adopt such a construction. Thus, in *Powell* v. *Hemsley*, [1909] 1 Ch. 680; [1909] 2 Ch. 252, the defendant had covenanted for himself his executors administrators and assigns not to do certain acts on the land, and thereafter demised to certain persons, who infringed the covenants, with the defendant's knowledge. Subsequently, the lessees became bankrupt, and the trustee in bankruptcy disclaimed the lease, thus throwing the land back upon the defendant. In an action upon the covenants the defendant was not liable, the breach not being a continuing one, notwithstanding that he had covenanted for himself, his executors administrators and assigns. As Eve, J., said : " Is such a covenant . . . equivalent to a covenant by the purchaser for himself his executors administrators and assigns that he his executors administrators and assigns will or will not do the particular act? I do not think it is. I have not been able to find any authority upon the point, but in my view the words are used in the first part of the covenant to indicate the intention that the covenants shall run with the land, and not to impose on the covenantor liability for the acts of his assigns " : at pp. 688-9; cf. *Porter* v. *Gibbons*, 48 S. J. 559.

Nor presumably would such liability be imposed on one who enters into a restrictive covenant where the words " for himself his executors administrators and assigns " are not expressed, but are implied by Law of Property Act, s. 79. Indeed, only the clearest words would justify such a construction of a restrictive covenant. In *Prothero* v. *Bell*, 22 T. L. R. 370, for example, there was a covenant not to use or permit to be used for immoral purposes and that nothing should be done to the annoyance of the lessor : it was held that the context made the second part absolute. It may be that the words sometimes found in old covenants after the covenant to observe the scheduled stipulations : " and that nothing shall be done or placed upon the land in contravention of the fair meaning of the said stipulations ", may have been intended to justify it.

The first way in which this proviso operates is conclusively to negative such absolute liability.

Alternatively, (b) the covenants may impose some vicarious

liability upon the covenantor, (further, of course, than liability for the acts of his agents) because the scheduled stipulations may contain one or more clauses in the form "not to permit or suffer" certain things to be done; as to the scope of which see V, §§ 37—41.

The second way in which this proviso can operate is by limiting such vicarious liability. If the form "after he has *parted with possession*" be used, the covenantor will be liable vicariously only for the acts of licensees; if the form "after he has *parted with all interest*" be used, he will be liable vicariously also for the acts of lessees. In neither case, however, will he be liable for the acts of those to whom he sells the fee.

Or (c) the covenants may impose no vicarious liability at all, because they are all in the form "*not to do* certain acts". Then the covenantor would not in any circumstances be liable for the acts of anyone but himself or his agents. In such a case, of course, this proviso is unnecessary.

VII. *Power to waive or vary and to license deviations.*

11. *Power to waive or vary.*

**"And provided that the Vendor and his successors in title owners for the time being of the Vendor's Dale Estate shall have power from time to time to waive or vary or release any of the said stipulations, by any deed or deeds or by writing under his or their hand or hands."**

The desirability of this proviso has already been discussed: see § 7, *supra*: see also II, § 26. It is a question of fact, depending on the ordinary meaning of the expression, who is for the time being owner of the Dale Estate: *Everett* v. *Remington*, [1892] 3 Ch. 148. Such a proviso does not negative the existence of a building scheme: *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 665.

VIII. *Declaration against building or other scheme.*

12. *Declaration against scheme.*

**"And provided that nothing herein contained shall be deemed to imply the existence of a building scheme or other scheme of development or to prevent the Vendor from selling any part of [the land benefited] free from all or any of the said stipulations."**

A scheme once constituted binds the common vendor no less than purchasers from him, and it will sometimes be desirable to insert this proviso when some or all of the factors which go to constitute a scheme are present, but where the common vendor

does not mean to create one. Such a declaration operates to negative the intention which is essential to the creation of a scheme: see II, § 19.

B. *Further covenant by Purchaser with adjoining owners.*

13. *Covenant with other adjoining owners.*

**"The Purchaser hereby covenants as a separate covenant with the owner or owners for the time being of the lands coloured blue on the plan drawn hereon to observe the said stipulations."**

It will sometimes be desirable, without creating a scheme, to annex the benefit of the covenants to land other than that of the Vendor. In such a case it is not necessary for the owners of the land so benefited to be parties to, or execute, the conveyance, but the covenant will take effect under Law of Property Act, 1925, s. 56 (replacing Real Property Act, 1845, s. 5). Regard must, however, be had to the scope of that section: see I, § 8; in particular, the persons with whom such a covenant is originally to be made must be designated, either expressly or clearly enough to enable them to be identified; they must be *in esse* at the date of the conveyance; and there must be actual words of covenant with them; a vague indication that they are intended to benefit is not enough. Moreover, all the ordinary rules applicable to a covenantee must be observed, and their land must be as clearly designated as that of any other covenantee. It need not, of course, be designated by a plan. Any of the forms given in § 5, *supra*, may be adapted for this purpose.

C. *Conveyance by the Common Vendor to the Purchaser of a plot on an estate subject to a scheme.*

I. *Recitals of intention.*

14. *Scheme: Recitals.*

**"Whereas**

**(1) The Vendor is estate owner in fee simple of certain lands at Dale in the County of Clay known as the Dale Estate.**

**(2) On or about the —— day of —— 19— the Vendor laid out a part of such lands known as the Dale Hall Building Estate of which the land hereby conveyed forms part in lots for development as a building estate and has caused an estate plan thereof to be prepared showing the Dale Hall Building Estate allotted into plots for**

**such purpose (which plan has been inspected by the Purchaser) and has caused a common form of Conveyance (being in the same form as this deed) to be prepared containing divers stipulations to be observed by the owner for the time being of each of such plots varying inter se in accordance with the nature of each plot and the scheme of development to be carried out but not otherwise.**

**(3) It is the intention of the Vendor and the Purchaser purchases upon the express understanding that subject as hereinafter appears each Purchaser of part of the Dale Hall Building Estate is to have the benefit of the stipulations binding on all the other plots forming part of such estate whether such plots are sold to the respective purchasers of them before or after the date of the Conveyance by the Vendor to each such purchaser."**

The question whether a building scheme has been created is one of intention. In the absence of an express statement, or direct evidence of such intention, its existence or non-existence can be and is collected from an inquiry whether the case falls within the rules laid down in *Elliston* v. *Reacher*, [1908] 2 Ch. 374 : see II, § 22. But it will normally be desirable to state the facts and *intention* expressly in the conveyances, so as to minimise the expense of proof in any subsequent action upon the covenants. Some or all of the foregoing recitals should therefore be inserted in the conveyances, according to the facts. They will be binding upon the persons executing the deed containing them, namely each purchaser and the common vendor : see *Mackenzie* v. *Childers*, 43 Ch. D. 265.

## II. *The creative words.*

15 *Scheme : the creative words.*

*The words of Covenant :*

**" The Purchaser hereby covenants "**

*The designation of the Covenantees :*

**" With the Vendor and all other persons claiming under him as purchasers of any part or parts of the said Dale Hall Building Estate."**

*The binding words :*

**" To the intent that the burden of this covenant may run with and bind the land hereby conveyed and every part thereof."**

*The words of annexation:*

**"And to the intent that the benefit thereof may be annexed to and devolve with each and every part of the said Dale Hall Building Estate other than the plot hereby conveyed [and with the residue of the Vendor's Dale Estate and each and every part thereof]."**

No annexation is necessary: see II, § 23, but it may be desirable. As to the words in brackets, see *Elliston* v. *Reacher*, [1908] 2 Ch. 374, at p. 384. If the vendor has land other than the building estate it will be desirable to make this annexation, so that he may be in a position to enforce the covenants after the building estate is sold off. As to the position of a common vendor who retains a small part of the building estate itself, so as to keep the control, see II, § 10. In such cases he should retain at least one plot of a size as large at least as the smallest ordinary plot on the estate.

*The matter covenanted:*

**"To observe the stipulations contained in the Schedule hereto so far as the same relate to the land hereby conveyed."**

In most cases the stipulations will not be exactly uniform for all plots, but will aim at securing, for example, that plots 1—10 shall be used for small private houses, 11—20 for larger private houses, 21—30 for shops, and others for schools, churches and the like. The common form conveyance should set out the stipulations governing all the lots, so that each purchaser can see the whole "local law" from his title deeds.

It is a common practice to insert positive obligations (such as covenants to erect or maintain fences) in the Schedule. The burden of positive covenants cannot run with the land, and it is less confusing if such personal obligations are kept separate from the restrictive stipulations: they should therefore appear in a separate clause in the body of the deed.

*Exclusion of personal liability of covenantor who has parted with the land restricted.*

[*Vide supra*, § 10.]

16. *Scheme: Power to waive and vary.*

*Power to waive or vary and to license deviations.*

**"Provided always that**

**(1) the Vendor and his successors in title owner or owners for the time being of the Dale Estate**

*or* (2) the Vendor and his successors in title owner or owners for the time being of Lot 1 on the Dale Hall Building Estate

*or* (3) the Vendor and his successors in title owner or owners for the time being of the part or parts of the Dale Hall Building Estate remaining unsold

shall have power [in his or their absolute discretion] from time to time by any deed or deeds or by writing under his or their hand or hands to waive or vary or release any of the said stipulations in respect of the plot hereby conveyed or any other plot forming part of the said Dale Hall Building Estate or to sell and convey any part thereof which has not been sold prior to the date hereof free from any or all of the said stipulations and either subject or not to any different stipulations

[Provided nevertheless that the power hereby reserved shall not be exercisable so as to create a radical alteration in the scheme of development comprised in the stipulations herein contained and that any purported exercise of the same contrary to this proviso shall be void.]

See II, § 26. The draftsman must consider in each case how drastic a power of variation the vendor desires to reserve, and should insert or omit the words in brackets accordingly. A "radical alteration" does not seem to be an expression capable of very exact definition, but was used by Vaughan Williams, L.J., in *Whitehouse* v. *Hugh*, [1906] 2 Ch. 283, at p. 286.

If the vendor has other property in the neighbourhood, it will be desirable that the owner of that property should have the power. If not, it will be best to let it run with one of the plots. That plot can then be sold for a price enhanced by the existence of the power, since it is a source of income from fees. The power is sometimes found concealed among the stipulations. Such an arrangement is inelegant, since the stipulations deal with the things not to be done on the land and not with the extent of the obligation. The power can, of course, be made to go with the unsold part of the building estate; such a power will not survive the sale of the last plot.

## V. Breach.

### 1. *Introductory.*

A large proportion of the numerous authorities upon breach of covenants affecting land arise out of covenants affecting leaseholds; but upon the question whether they have been broken or not there is no difference in principle between such covenants and

freehold covenants, though in so far as the particular circumstances are material to the result, the fact is one to be taken into account.

The circumstances are of the highest importance, particularly where the covenant in question is one in general terms. For example, in *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294, it was decided that the laundry there in question did not infringe a covenant not to do anything injurious to the land, nor to carry on any noisy, noxious or offensive business. The decision is not one that no laundry infringes any of these requirements, but only that no laundry *necessarily* does so, and that the laundry there in question did not. The authorities referred to below should be regarded, generally speaking, as guides, but not as laying down precise rules for the application of any given covenant to any given activity. The motive with which a defendant acts, however, is not material to the question whether his acts are a breach of covenant: *Rush* v. *Lucas*, [1910] 1 Ch. 437.

A.—(1) *Covenants against carrying on any trade or business.*

2. *All trades or businesses.*

Covenants are often imposed upon land in residential areas " not to carry on any trade, business or calling whatsoever ", or some such general prohibition, sometimes subject to an exception in favour of specified business activities.

3. *Distinction between trades and businesses.*

There is a broad distinction between " trade " and " business ". " Every trade is a business, but every business is not a trade: to answer to that description it must be conducted by buying and selling ": *per* Denman, C.J., in *Doe* d. *Wetherell* v. *Bird*, 2 A. & E. 161, at p. 166. " Business ", however, includes almost all serious occupations: see *per* Lindley, L.J., in *Rolls* v. *Miller*, 27 Ch. D. 71, at p. 88.

A general prohibition against both was held to be broken by carrying on a girls' finishing school : *Kemp* v. *Sober*, 1 Sim. (N.S.) 517; see also *Johnstone* v. *Hall*, 2 K. & J. 414; *Wickenden* v. *Webster*, 6 El. & B. 387. A school for fifty boys was held to be a business in *Doe* d. *Bish* v. *Keeling*, 1 M. & S. 95. The distinction between " trade " and " business " is, however, illustrated by *German* v. *Chapman*, 7 Ch. D. 271, where it was held that an institution for a hundred daughters of missionaries was not a trade.

4. *Business.*

Taking in lodgers may be a business if it is done systematically enough : *Thorn* v. *Madden*, [1925] Ch. 847; and, *a fortiori*,

keeping a boarding-house, even if "high-class": *Milch* v. *Coburn*, 55 S. J. 441. In *Barton* v. *Reed*, [1932] 1 Ch. 362, the underlessee of a house sub-divided it into three flats, which she let off on tenancies of various lengths. She was held to be carrying on a business, notwithstanding that she did not reside there, because she retained control of certain parts of the house, *e.g.*, the stairs, and was obliged to provide certain services, *e.g.*, hot water. Luxmoore, J., said at p. 373: "I think this is none the less a business because it has no specific description. 'Business' of course is a wide and flexible term, but that the sub-letting of premises in suites of apartments, *with or without the provision of any other service*, is a business, I think can be open to little doubt." And he relied on Landlord and Tenant Act, 1927, s. 17 (3), in which it was thought necessary expressly to exempt premises sub-let as residential flats, with or without services, from "business premises" for the purposes of that Act. Presumably, however, in the absence both of control of part of the premises, and of the provision of services, the case might be different. Some system is necessary: thus, in *Thorn* v. *Madden* it was doubted whether it would be a breach of covenant not to carry on a business if one took in a friend as a paying visitor: see *Porter* v. *Gibbons*, 48 S. J. 559. Similarly, in *Wills* v. *Adams*, 25 T. L. R. 85, it was doubted whether such a covenant would be infringed by the holding of a *single* auction-sale of furs.

On the other hand, the intention to make a profit is not a necessary ingredient of a business. In *Rolls* v. *Miller*, 27 Ch. D. 71, the defendants were restrained from carrying on a home for working girls in breach of a covenant not to carry on a business. The injunction was granted on the footing that payment was to be taken from the boarders, but it was no excuse for the defendants that they took no payments, when the Court was moved to commit them. Similarly the carrying on by a corporation of a nursing home open only to its members is a breach of such a covenant: *Portman* v. *Home Hospital Association*, 27 Ch. D., note at p. 81. So also was a hospital for poor persons who made small payments according to means: *Bramwell* v. *Lacy*, 10 Ch. D. 691.

Nor is any actual activity necessary: letting gable-ends for the posting of advertisements was held to be a business in *Tubbs* v. *Esser*, 26 T. L. R. 145; cf. *Heard* v. *Stuart*, 24 T. L. R. 104.

Again, part of a business may be a breach of a covenant against any business. Thus the erection of stables for the horses used in the defendant's neighbouring business of a coal-merchant was a breach of such a covenant: *White* v. *Pollard*, 52 S. J. 748; cf. *Blake* v. *Marriage*, 9 T. L. R. 569. And user of a house as a

boarding-house ancillary to a school nearby was held to infringe such a covenant : *Hobson* v. *Tulloch*, [1898] 1 Ch. 424.

5. *" Offensive " trades and businesses.*

In some cases the covenant prohibits only trades or businesses described as " offensive ", " noxious ", " dangerous ", " noisome ", or some similar adjective referable to amenity. Sometimes the prohibition stands by itself; sometimes, at the end of a list of specific activities, the covenant precludes " any other offensive trade or business ".

The word " offensive " will probably not be construed *ejusdem generis*, if it stands with other adjectives of more specific meaning : see *per* Cozens-Hardy, M.R., and Buckley, L.J., in *Nussey* v. *Provincial Billposting Co.*, [1909] 1 Ch. 734, at p. 739, but see *contra per* Fletcher Moulton, L.J., *ibid.*, at p. 742. Nor will the word " offensive " be construed *ejusdem generis* with a list of specified trades which precede it in the covenant : *Pembroke* v. *Warren*, [1896] 1 Ir. R. 77 ; *Devonshire* v. *Brookshaw*, 81 L. T. 83 ; cf. *White* v. *Pollard*, 52 S. J. 748. An *ejusdem generis* construction may, however, be given to particular covenants : see *Derby Motor Cab Co.* v. *Crompton*, 31 T. L. R. 185 ; *Formby* v. *Barker*, [1903] 2 Ch. 539, *infra*, § 13.

The authorities on this part of the subject have to be viewed with especial caution, since the exact words and facts are vital to the decisions. Regard must be had, first, as in cases of nuisance, to the circumstances of the neighbourhood, since, for instance, what is offensive in a residential area is not necessarily so in a factory district ; secondly, to the exact words of the covenant ; thirdly, to the circumstances of the alleged breach. The activities discussed in some cases were perhaps necessarily offensive, but most cases turn on the question of fact whether an activity not *per se* offensive is actually being so carried on as to be offensive in the place where it is carried on : see *per* Tindal, C.J., in *Gutteridge* v. *Munyard*, 7 C. & P. 129, and *Flight* v. *Booth*, 1 Bing. N. C. 370. Thus in *Devonshire* v. *Brookshaw*, 81 L. T. 83, Kekewich, J., held that the fried fish shop in question was offensive in the circumstances, though not necessarily so.

In *Hall* v. *Ewin*, 37 Ch. D. 74, an exhibition of lions in a house in Edgware Road advertised by black men parading outside with a gong and a trumpet was an offensive business. A lunatic asylum has been held offensive : *Doe* d. *Wetherell* v. *Bird*, 2 A. & E. 161 ; and so has the maintenance of a hoarding 156 ft. by 15 ft. for the display of advertisements in a suburb of Leeds : *Nussey* v. *Provincial Billposting Co.*, [1909] 1 Ch. 734 ; and a nursing home in

Fitzwilliam Square, Dublin : *Pembroke* v. *Warren*, [1896] 1 I. R. 77. In *Reeves* v. *Greenwich Tanning Co., Ltd.*, 2 Hem. & M. 54, it was held that a tannery may be an offensive business. Lime-kilns, steam-saws and grinding machinery were contrary to a covenant against a noisome trade or business : *Wiltshire* v. *Cosslett*, 5 T. L. R. 410.

Conversely, in *Hickman* v. *Isaacs*, 4 L. T. 285, it was held that to deposit large quantities of lucifer matches, so that the premises where they were deposited were uninsurable against fire, was not an offensive or noisome trade. It was, however, a "dangerous" one, as was also the exhibition and sale of petrol vapour lamps : *Teape* v. *Dowse*, 92 L. T. 319; and probably the storing of paraffin and petroleum : *Power* v. *Barrett*, L. R. 19 Ir. R. 450.

6. *Activities not necessarily offensive.*

A laundry at Wimbledon was held not to be a noisy, noxious, or offensive business, nor injurious to the land : *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294. Nor was a public-house necessarily an offensive business : *Jones* v. *Thorne*, 1 B. & C. 715; nor flats : *Vernon* v. *Small*, [1936] I. R. 677; nor a slaughter-house : *Cleaver* v. *Bacon*, 4 T. L. R. 27; *Rapley* v. *Smart*, 10 T. L. R. 174; nor a surgical hospital for tuberculosis on a residential estate : *Frost* v. *The King Edward VII Welsh National Municipal Association, etc.*, [1918] 2 Ch. 180 (compromised on appeal, 35 T. L. R. 138); nor brick-burning : *Cleeve* v. *Mahany*, 9 W. R. 882. Similarly, in *Moses* v. *Taylor*, 11 W. R. 81, it was held that evidence of the collection of a crowd was not conclusive to bring a mock-auction within the mischief of a covenant against offensive businesses, though in other circumstances the holding of mock-auctions has been held a public nuisance : *Malzy* v. *Eichholz*, [1916] 2 K. B. 308.

### A.—(2) *Particular Trades and Businesses.*

7. *Particular trades and businesses.*

The question whether a particular business is or is not being carried on may be raised either by the plaintiff if that business is expressly prohibited, or by the defendant if it is permitted by exemption from a general prohibition. The answer may be obvious, if the defendant's business is entirely different from, or is exactly, that prohibited or permitted. In *Holloway Bros.* v. *Hill*, [1902] 2 Ch. 612, the defendant's business *was* that of a tailor: this was enough, and an attempt to show that it did not compete with the plaintiffs' was abandoned.

8. *Triviality.*

Slight differences will be disregarded, which may work for or against the plaintiff. Thus, in *Fairtlough* v. *Whitmore*, 11 T. L. R. 288, an undertaking was given in an action not to permit baccarat to be played on the premises. On a motion to commit, it was no excuse that the defendant had permitted only chemin-de-fer (which is a variety of the same game, and just as unlawful: *Jenks* v. *Turpin*, 13 Q. B. D. 505). And conversely, where premises were let with a covenant by the lessee to use them only as a Post Office, the sale of dog-licences was not a breach, it was not "another purpose": *Wadham* v. *Postmaster-General*, L. R. 6 Q. B. 644.

But effect will, of course, be given to a substantial difference between the defendant's business and a business prohibited or permitted. Thus, a motor showroom was held not to be within a covenant against a "motor garage or office": *Derby Motor Cab Co.* v. *Crompton*, 31 T. L. R. 185. And where a covenant was to use premises only as a private club, a single boxing match, which was advertised, and for which *ad hoc* members were to be admitted, was restrained: *Seaward* v. *Paterson*, 12 T. L. R. 525. And if the plaintiffs have reasonable grounds for thinking that a single boxing match will endanger the licence (*a*) contrary to a covenant the defendants will be restrained: *District Ry. Co., Ltd.* v. *Earls Court, Ltd.*, 55 S. J. 807.

9. "*Similar business.*"

In *Drew* v. *Guy*, [1894] 3 Ch. 25, a lease contained a covenant not to carry on a restaurant business similar to that carried on by R. The lessees (the A.B.C.) observed the covenant, and sold soft drinks and cold meat; but the defendant, who took from them, sold also hot meat. He was held to have broken the covenant, notwithstanding that he had no licence (as R. had), and that his establishment was inferior to, and cheaper than R.'s. The injunction, however, provided that he was not to be restrained from selling what the A.B.C. had sold.

10. *Parts of trades and businesses.*

Although carrying on a part of a trade is a breach of a covenant against *all* trades (see *supra*, § 4), selling some articles sold in a particular prohibited trade is not necessarily a breach of that prohibition. Thus, confectioners sell sweatmeats; but the sale of

(*a*) A conviction for breach of the licensing laws has been held not necessarily to endanger the licence: *Fleetwood* v. *Hull*, 23 Q. B. D. 35; cf. *Wooler* v. *Knott*, L. R. 1 Ex. D. 265.

about 28 lbs. a week of a particular kind of sweetmeat does not make a grocer a confectioner: *Lumley* v. *Metropolitan Ry.*, 34 L. T. 774. Similarly, vests are sold by ladies' outfitters; but where this trade was prohibited by a covenant, the Court of Appeal, overruling Kekewich, J., held that the *bona fide* sale of vests by a hosier was not a breach: it would have been different had the sale of other articles been "colourable, and adopted for the purpose of preventing them being considered ladies' outfitters", or if the covenant had forbidden "any part of the business": *Stuart* v. *Diplock*, 43 Ch. D. 343; cf. *Bailey* v. *Skinner*, 42 S. J. 780. But even where the covenant was not only against the business of a draper, but also against dealing in drapery goods, an injunction was refused against a person who proposed to let the premises for a particular sale of furs or fur-lined goods, notwithstanding evidence that some drapers sell furs: *Wills* v. *Adams*, 25 T. L. R. 85. Similarly, a covenant by a lessor not to let adjoining shops for the sale of "souvenirs" at the Wembley Exhibition, was held not to be infringed by the incidental sale of "souvenirs" by his tenants whose main businesses were those of a tobacconist, toyshop, and tailor respectively: *L. S. G., Ltd.* v. *Lawrence*, 42 T. L. R. 85; *aliter*, if there is a lessor's covenant in a lease against letting "any other portion of the said arcade for the trade or business to be carried on by the tenant"; this was held to be broken where the lessor let for a trade which overlapped the covenantee's: *Brigg* v. *Thornton*, [1904] 1 Ch. 386.

11. *Ancillary businesses.*

The fact that the business complained of is ancillary to another business has often been held to be no defence if the business complained of is in fact in breach of covenant.

Thus a covenant in a lease not to let other premises as a coffee-house was broken by letting them to grocers, who also sold cups of tea and coffee and other light refreshments: *Fitz* v. *Iles*, [1893] 1 Ch. 77. A theatre lessee who maintained a bar in his theatre, with no outside access to it, infringed a covenant not to carry on the "trade of a . . . retailer of wines spirits and beer": *Buckle* v. *Fredericks*, 44 Ch. D. 244; and a carpenter, by selling raw meat infringed a covenant not to carry on the business of a butcher: *Doe* d. *Gaskell* v. *Spry*, 1 B. & Ad. 617.

12. *Sale of liquor.*

Perhaps the commonest class of ancillary business is the sale by grocers of intoxicating liquors. In many of the following cases the defendant was a grocer who also sold liquor.

In *Wilson* v. *Hart*, L. R. 1 Ch. 463, the covenant was not to use the premises "for the sale of ale, beer, wines or spirits or any other intoxicating liquor". The defendant was a grocer, who sold ale and beer under an off-licence; his conduct was plainly a breach. Similarly, in *Feilden* v. *Slater*, L. R. 7 Eq. 523, the covenant was not to use the premises as "an inn public house or taproom or for the sale of spirituous liquors or ale or beer". The defendant, a grocer, sold wine and spirits in bottle, and the sale of spirits, though not of wine, was a breach of the latter part of the covenant, James, V.-C., holding that that was not cut down by the earlier part.

These decisions would appear to carry conviction, and, it is submitted, were correct. *Jones* v. *Bone*, L. R. 9 Eq. 673, may, however, be inconsistent with them. There the covenant was against user as "a site or sites for any hotel, tavern, public house or *beerhouse*", and against the trades of "hotel or tavern keeper, publican, or *beershop* keeper, or seller by retail of wine beer spirits or spirituous liquors". The defendant sold wine and spirits in bottle, but James, V.-C., refused relief by injunction, saying: "I do not think this is a case in which *this Court* ought to interfere; but my refusal will not of course prejudice the plaintiff's legal rights": at p. 677. He distinguished *Feilden* v. *Slater* upon the ground that at the date of the covenant in that case (1854) "a seller by retail of liquors" was an apt expression to cover a person who kept a bar, and could not have been meant to apply to a grocer who, under the new excise laws, sold liquor as ancillary to his business, "which is really only a modification of the old wine merchant's business": at p. 678. In *Buckle* v. *Fredericks*, 44 Ch. D. 244, however, Cotton, L.J., expressed the view that James, V.-C., only held that *Jones* v. *Bone* was not a case for an injunction.

A covenant not to build a "hotel, tavern public-house or beer-house, shop or other building for the sale of" liquor, was held to be broken by the erection in January of a restaurant for which a licence was obtained in March: *Webb* v. *Faggotti*, 83 L. T. 257.

But sale means sale to the public: a club selling liquor to its members has been held not to infringe a covenant not to use the premises for the sale of liquor: *Ranken* v. *Hunt*, 10 R. 249.

13. "*Beershop*."

"A shop means a place where goods are sold by retail, a beer-shop, therefore, means a place where beer is sold by retail, and it does not matter whether the beer is consumed on the premises or not. The word includes a beerhouse, but it also includes a shop where beer is sold to be consumed off the premises": *per* Cotton, L.J.,

in *London & Suburban Land and Building Co.* v. *Field*, 16 Ch. D. 645, at p. 648. Grocers selling beer under an off-licence have accordingly also been held to infringe a covenant against user as a beershop: *Bishop of St. Albans* v. *Battersby*, 3 Q. B. D. 359; *Nicoll* v. *Fenning*, 19 Ch. D. 258. Similarly, the sale of wine by the glass is carrying on the business of a wine-shop, and it therefore infringes a covenant to use only as a wine-merchant's office: *Randell* v. *Block*, 38 S. J. 141.

Further, in *Devonshire* v. *Simmons*, 11 T. L. R. 52, the covenant was not to use the premises "as a public-house or beershop". The defendants opened a "first-class hotel" and obtained a licence to serve liquor, provided that there should be no public bar, and that only hotel guests should be served. It was held not to be a public-house, but that it probably was a beershop. In view, however, of undertakings given by the defendants no order was made on the motion for an interlocutory injunction.

In a covenant not to build "any beerhouse or shop or any hotel of less annual value than £50" "shop" was held to mean "beer-shop", with the consequence that the defendants were not liable for opening ordinary shops unconnected with the sale of beer: *Formby* v. *Barker*, [1903] 2 Ch. 539 (*b*). But taverns and public-houses are "houses of entertainment" as well as places where liquor is sold by retail, and therefore cannot be erected on shop-lots in a building scheme: *Coombs* v. *Cook*, 1 Cab. & El. 75; *Hall* v. *Box*, 18 W. R. 820.

14. "*Beerhouse*", "*Public-house*", "*Tavern*".

On the other hand, the words "beerhouse", "public-house", or "tavern", look to consumption on the premises. Thus, in *Holt* v. *Collyer*, 16 Ch. D. 718, the covenant was not to use the premises as "a public-house, tavern, or beerhouse", and so the sale of liquor by a grocer under an off-licence was no breach. In this case, Fry, J., relied on the distinctions drawn in *Bishop of St. Albans* v. *Battersby* and *London & Suburban Land Co.* v. *Field*, *supra*, but also appeared to think that *Jones* v. *Bone*, *supra*, was

(*b*) The sale of wine and spirits in bottles for consumption off the premises is also a breach of a covenant against carrying on the trade of a "vintner": *per* Romilly, M.R., in *Wells* v. *Attenborough*, 24 L. T. 312.

Similar considerations apply to the sale of other goods for consumption off the premises. In *Errington* v. *Birt*, 105 L. T. 373, the defendant carried on a fried fish business, half his trade being for consumption off the premises. Avory, J., held (1) it was not a nuisance; (2) it was not a fishmonger's business, any more than a chop-house is a butcher's; (3) it was not a fat-melter's business: else every cook would be one. But he held that the consumption off prevented its being a restaurant (which was the only permitted business) and that there might reasonably be annoyance (on the last point, cf. *Zetland* v. *Driver*, [1937] Ch. 651; [1939] Ch. 1).

direct authority on the point at issue. The better view of that case is, however, that James, V.-C., did no more than find that there was no case for an injunction. *Holt* v. *Collyer* was followed in *Re Cullen and Riall's Contract*, [1904] 1 I. R. 206, where a "spirit-grocer" was held not to be a "publican". As to "beer-house", see also *L. N. W. Ry.* v. *Garnett*, L. R. 9 Eq. 26, and as to "public-house", see *Pease* v. *Coats*, L. R. 2 Eq. 688.

15. "*Hotel*" *and* "*Inn*".

"The word 'hotel' is defined in a dictionary which I have consulted as 'a genteel inn or superior lodging house': the word 'hotel' always imports a house where travellers are taken in to lodge, and a licensed hotel is licensed for the sale *inter alia* of beer": *per* Vaughan Williams, L.J., in *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 548. Thus, in *Whatman* v. *Gibson*, 9 Sim. 196, opening a "family hotel" infringed a covenant against carrying on the trade of an innkeeper.

In *Elliston* v. *Reacher*, [1908] 2 Ch. 374, at p. 394, Parker, J., doubted whether the hotel in question was an inn, or beerhouse. But a licensed hotel, however "genteel", probably infringes a covenant against user as a beershop: *Devonshire* v. *Simmons*, 11 T. L. R. 52.

### B.—(1) *Nuisance, Annoyance, etc.*

16. *Nuisance or annoyance.*

When the covenantee desires to prevent conduct inconvenient or distasteful to himself or the neighbours, he takes covenants forbidding the commission of any "nuisance", coupled with one or more other words of description such as "annoyance", "injury" or "damage" (*c*). Sometimes the person not to be inconvenienced is the covenantee, be he lessor or neighbouring freeholder; sometimes other tenants of the lessor are included; again, the prohibited inconvenience may be to "the neighbourhood". The last is good only in covenants between lessor and lessee. In freehold covenants it is bad, since damage to the neighbourhood, other than the "protected land", cannot be said to touch and concern the protected land: *Zetland* v. *Driver*, [1939] Ch. 1.

Where a number of words such as nuisance or annoyance occur together, effect must be given to all of them; "I take it

(*c*) As to the scope of a covenant for "quiet enjoyment" in this connection, see *Manchester, Sheffield and Lincoln Ry.* v. *Anderson*, [1898] 2 Ch. 394; *Jaeger* v. *Mansions Consol., Ltd.*, 87 L. T. 690. In *Jenkins* v. *Jackson*, 40 Ch. D. 71, dancing amounted to a nuisance without being a breach of that covenant.

to be clearly settled that effect must be given to the words 'annoyance or damage' where they occur in addition to the word 'nuisance'": *per* Stirling, J., in *Re Davis and Cavey's Contract*, 40 Ch. D. 601, at p. 606.

The word nuisance is undoubtedly a fairly narrow word; indeed, in *Harrison* v. *Good*, L. R. 11 Eq. 338, Bacon, V.-C., held that it meant a nuisance at common law, and no more. In that case the word nuisance stood alone in the covenant, and the fact complained of was the erection of a national school. The learned Vice-Chancellor held that this was not a nuisance, and the bill was dismissed (*d*). But in *Tod-Heatly* v. *Benham* (1888), 40 Ch. D. 80, the Court of Appeal expressed doubts as to the correctness of the decision of Bacon, V.-C. "When Bacon, V.-C., held . . . that the word 'nuisance' in the covenant meant only that which would be an actionable nuisance without the covenant I doubt whether he gave sufficient weight to the consideration that the whole object of having a covenant against nuisance is to give the covenantee some protection in addition to what he would have had without the covenant; but for a nuisance in the strict sense there would be an action, covenant or no covenant": *per* Lindley, L.J., at p. 95 (*e*). The observations of the Court of Appeal were not essential to the decision of the case, but have been regarded since as correct. It seems, therefore, that *Harrison* v. *Good* would now be differently decided.

17. *Hospitals.*

*Tod-Heatly* v. *Benham* was, however, an example of the much commoner sort of case, where "nuisance" does not stand alone. The covenant was against "doing any act which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns. . . ." The breach alleged was the establishment of a hospital for the treatment of outdoor patients suffering from "diseases of the throat, nose, ear, skin, and eye, fistula and other diseases of the rectum and various deformities of the human frame", intended for poor persons and supported by voluntary contributions. Kekewich, J., granted an injunction, and his decision was upheld by the Court of Appeal. The Lords Justices made it clear that whatever "nuisance" may mean,

(*d*) On the evidence before the Court as to the indecent conduct of the schoolchildren, it seems that it would not be impossible to say that there was a common law nuisance under the rule in *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, as now further expounded by Bennett, J., in *Att.-Gen.* v. *Corke*, [1933] Ch. 89.

(*e*) Further, an injunction is granted virtually as of course for breach of an express negative covenant; the element of discretion is greater in tort: see *Jenkins* v. *Jackson*, 40 Ch. D. 71, and VI, § 2.

"annoyance" implies something more; else it would not have been mentioned: see *per* Bowen, L.J., at pp. 97-8, who also said: "If you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort." A further passage of the judgment of the learned Lord Justice well illustrates the principles involved: "It is said that nobody has ever gone to apply for assistance, even by inadvertence, who has had an infectious disease. That may be so, but if so, the hospital has been very fortunate. Poor ignorant people who are suffering from certain diseases are collected there, and it appears to me not unreasonable that the neighbourhood should be apprehensive as to consequences; and if the neighbourhood is reasonably apprehensive as to the consequences, the matter, I think, comes within the covenant": at p. 99. These cases are therefore not necessarily conclusive even upon similar facts arising at a different period; further, differences of locality may lead to different results in similar cases at the same period.

In *Bramwell* v. *Lacy* (1879), 10 Ch. D. 691, one of the grounds of the decision was the danger of infection. There a throat and chest hospital for out-patients was held to infringe a covenant against causing "annoyance, inconvenience and injury". Similarly, in *Watson* v. *Leamington College*, 25 S. J. 30, Jessel, M.R., held that a sanatorium for six infectious boys was an annoyance. But in 1918 Eve, J., held that to carry on a surgical hospital for the treatment of turberculosis was not to "do . . . anything which might be hazardous or noisome or injurious or offensive" to the lessor or his property or tenants: *Frost* v. *The King Edward VII Welsh National Municipal Association, etc.*, [1918] 2 Ch. 180 (compromised on appeal, 35 T. L. R. 138). This case, however, differs from the other hospital cases because none but in-patients were received.

18. *Advertisements.*

That locality is a factor in ascertaining whether any given act infringes a covenant against annoyance is well shown by *Heard* v. *Stuart*, 24 T. L. R. 104, and *Our Boys Clothing Co., Ltd.* v. *Holborn Viaduct Land Co., Ltd.*, 12 T. L. R. 344. In the former case, the defendant let to a billposting company a wall abutting on a church-yard and opposite to the church door. The company thereon exhibited advertisements of alcoholic drinks and other commodities. The Court granted an injunction and a mandatory

order to remove the bills. In the other case, however, the lessees of a shop put up a large advertisement along the front of their premises announcing their summer sale. This was held not to be a breach.

19. *Schools.*

Schools have often been held to constitute breaches of covenants against causing annoyance. Thus, in *Kemp* v. *Sober* (1851), 1 Sim. (N.S.) 517, a finishing school for twenty girls infringed such a covenant, since the "neighbours will suffer annoyance not only from their practising music and dancing, but from their relations and friends continually calling upon them": *per* Cranworth, V.-C., at p. 520; cf. *Johnston* v. *Hall*, 2 K. & J. 414, 425. Similarly, in *Wauton* v. *Coppard*, [1899] 1 Ch. 92, the covenant was "not to suffer to be . . . carried on . . . any trade or business . . . whereby . . . any injurious or offensive or disagreeable noise or nuisance shall or may be . . . occasioned, caused or made". Romer, J., held that to carry on a preparatory school for boys might be a breach, because if the plaintiff should "proceed to carry on his school in the ordinary way" there would be "a 'disagreeable' if not an 'injurious or offensive noise or nuisance' ".

20. *The sense offended.*

Occupations causing noises or smells may well constitute annoyance. Thus the business of char-à-banc and taxi-cab proprietors was held to constitute an annoyance or disturbance, though not to amount to a common law nuisance: *Ives* v. *Brown*, [1919] 2 Ch. 314, 321. And in *Errington* v. *Birt*, 105 L. T. 373, a fried fish shop was likewise restrained.

Things obnoxious to the sense of sight may also infringe covenants against annoyance. Thus, in *Wood* v. *Cooper*, [1894] 3 Ch. 671, a wooden screen or trellis 12 feet high was held to constitute a breach, when placed just inside the boundary fence between the defendant's house and the adjoining house, even though the defendant argued that its purpose was to prevent his neighbour from overlooking his garden. But in *Gresham Life Assurance Society, Ltd.* v. *Ranger*, 15 T. L. R. 454, the permanent lowering of a blind outside a shop which obscured from passers-by the window displays of the neighbours was held not to be an annoyance to the neighbourhood.

But the cause of annoyance need not necessarily be offensive to the senses. Thus, in *Mander* v. *Falcke*, [1891] 2 Ch. 554, it was held that to run an establishment as a brothel under the pretence of its being an oyster bar infringed a covenant in a

lease not to do anything "which might grow to the annoyance, damage, injury, prejudice or inconvenience of the premises or of the adjoining property of the lessor or of the occupiers thereof". The case was put on the ground of "great annoyance of the neighbourhood".

21. *Annoyance generally.*

Allowing for circumstances and for changes in outlook, the test of annoyance remains that stated in *Tod-Heatly* v. *Benham*, 40 Ch. D. 80, and approved in subsequent cases; cf., for example, *Wood* v. *Cooper*, [1894] 3 Ch. 671, *per* Romer, J. As Sargant, J., said in *Ives* v. *Brown*, [1919] 2 Ch. 314, at p. 321: "Such covenants are, of course, framed for the very purpose of securing a much more adequate protection than that given by the ordinary law of nuisance; and while I recognise that they must not be used to indulge fanciful or capricious objections or apprehensions, I am satisfied that there was an annoyance or disturbance going far beyond this, and of a definite practical character."

### B.—(2) *Judgment and Opinion.*

22. *Judgment and opinion.*

A practice has grown up of prohibiting by covenant not annoyances *simpliciter*, but anything which in the opinion of a designated person is an annoyance. There is no reason why the covenant against annoyance only should be so extended; thus, power might be given to form an opinion on what is an offensive trade.

The effect of such a provision is to substitute the opinion of the designated person for the decision of the Court upon what is an annoyance. Such a person is not required to act judicially, and, accordingly, an activity may become obnoxious to such a covenant without infringing a covenant against annoyance *simpliciter*. On the other hand, forming an opinion is a condition precedent to bringing an action and the covenant will cease to have effect if at any time there is no person to answer the description.

In *Berton* v. *Alliance Economic Investment Co., Ltd.*, [1922] 1 K. B. 742, the covenant was not to do "anything which in the judgment of the lessors might be or grow to the injury or annoyance of the lessors". In *Barton* v. *Reed*, [1932] 1 Ch. 362, the opinion was to be that of the Governors of Dulwich College and their successors. In *Zetland* v. *Driver*, [1937] Ch. 651; [1939] Ch. 1, it was "the opinion of the vendor" which was required, and by a definition clause the vendor was to include "his successors in

title ". As a matter of construction the Court of Appeal held that the latter expression meant the persons taking the unsold part of the protected land by succession: see *per* Farwell, J., [1939] Ch. 1 (C. A.), at p. 9. In all these cases, therefore, the opinion was to be formed by the person or persons entitled to enforce the covenants for the time being, or one of them. It is possible to select from among the persons capable of suing (*f*) one to form an opinion, as was done in *Zetland* v. *Driver*; and the covenant might require such a person to be ascertained by reference to the ownership for the time being of a particular estate, in the same way as a power to waive and vary is often limited : see IV, § 11. Again, it would, of course, be possible to limit the power to the original covenantee alone.

23. *Opinion: How formed.*

The person forming an opinion must address his mind to the question, and the activity complained of will be a breach of the covenant only so far as it comes within the opinion formed. Thus, in *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.), at p. 10, Farwell, J., said : " the injunction must be limited to fried fish, and the words ' other substances ' must be deleted, because the opinion of the appellant as to the nuisance was confined to fried fish ". If the opinion is that of a corporation, the proper steps must be taken to ascertain its collective mind, whatever its constitution declares them to be. In *Barton* v. *Reed*, [1932] 1 Ch. 362, the lessors were the Governors of Dulwich College, and Luxmoore, J., said at p. 374 : " It has been argued that there is no evidence that the Governors have in fact considered that what is being done is in fact an annoyance or inconvenience within the words of the covenant. The evidence of the Chairman of the Governors has satisfied me that the whole matter was considered at a properly constituted meeting of the Governors and that the members present were unanimous on the point before instructing the solicitors to take steps to enforce the observance of the covenant." Unanimity, of course, was not essential.

(*f*) It is doubtful whether a person who is incapable of suing (either *ab initio* or after having parted with all his protected land) could form the opinion. Any person might, of course, be appointed in advance as arbitrator, but he would then be bound to act in a judicial manner. If the power to form an opinion was conferred upon a person not otherwise interested, it is submitted that the tendency would be to construe this as the mere appointment of an arbitrator; but if the words expressly permitted him to form an opinion in the non-judicial manner here discussed, effect might perhaps be given to them. On the other hand, the power to form a valid opinion may apparently survive the right to enforce. Thus, the injunction in *Zetland* v. *Driver*, [1939] Ch. 1, was limited in time, but only so as to ensure that there was a person to answer the description.

24. *Grounds for opinion.*

The person forming an opinion is not acting in a judicial capacity. Consequently he is not bound to give the person whose activities are being considered an opportunity of being heard, nor to consider anything but his own convenience : *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.). But if it can be shown " that the opinion which [he] formed . . . was capricious, or other than a *bona fide* opinion formed after a proper consideration of the facts " (*ibid.*, at p. 7) his opinion will not be effective. If his conclusion is based upon inaccurate information, or is frivolously arrived at, he does not validly deem an activity to be an annoyance. Nor, it is submitted, does he do so if the activity is devoid of all external effect, so as to be incapable of being considered an annoyance by anyone.

25. *The neighbourhood.*

Moreover, such a covenant usually states in reference to what person or area the activities complained of are to be deemed an annoyance. It follows from the principles of enforceability of covenants that the only persons whose annoyance is material are those in possession of protected land. Accordingly, an annoyance to the neighbourhood is not material, save in so far as there is protected land in the neighbourhood, and if the words " or to the neighbourhood " follow other words which fully describe the protected land, they are pure surplusage: *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.). Apparently, therefore, if the opinion was formed solely upon annoyance to the neighbourhood, and not in reference to the protected land, it would not be valid; for example, if the protected land was used for purposes of manufacture in an otherwise residential area, a new factory, though possibly an annoyance to the neighbourhood, could not be validly deemed to be one to the protected land.

26. *Relief.*

Once a proper opinion has been formed, the plaintiff can obtain against the defendant the relief obtainable for breach of an ordinary covenant. The injunction which can be obtained will, however, be limited to the period during which there is in existence a person capable of forming the opinion: *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.). In that case the injunction was limited on this principle to the period during which some of the protected land remained unsold.

There is a difficulty in the conception of an opinion once formed continuing to be held, not only by the person originally forming

it, but also by all his successors in title. Later owners might well be unaware that their neighbours refrained from a particular activity only because a predecessor of their own had deemed it an annoyance. Nevertheless, the Court imputes the opinion once formed to the persons successively answering the description of the person to form it, and does not, owing to this difficulty, limit the injunction to the continued possession of protected land by the person originally forming the opinion: *Zetland* v. *Driver*, [1939] Ch. 1 (C. A.).

### C. *Buildings, their User and Value.*

27. *No buildings.*

A covenant may provide that all or part of the land shall be kept as an open space, and not built upon.

The covenant in *Tulk* v. *Moxhay*, 2 Ph. 774, was of this kind: it forbade the owners of Leicester Square garden to build upon it, and building thereon was accordingly restrained. But a covenant to keep a garden "open and unbuilt upon" was not broken by the construction of a urinal *under* the garden: *Graham* v. *Newcastle Corporation*, 67 L. T. 790. In *McLean* v. *Mackay*, L. R. 5 P. C. 327, the covenant was that a plot should "never be thereafter sold, but left for the common benefit" of the parties and their successors. This covenant was construed as one to leave the plot unbuilt upon, instead of one against alienation. The erection of a building was accordingly a breach which could be restrained. Similarly, in *Herbert* v. *Maclean*, 12 Ir. Ch. R. 84, a covenant in a building lease that there should be an area 8 feet wide along the frontage was construed as one to keep the area clear.

A covenant to erect no "building of an unseemly description" was held in a Scotch appeal to be too vague to be enforced: *Murray* v. *Dunn*, [1907] A. C. 283.

28. *Building plans.*

A covenant to submit plans of any proposed building before starting to erect it is to be treated as a covenant not to build without submitting plans for approval: *Powell* v. *Hemsley*, [1909] 1 Ch. 680; 2 Ch. 252. But if there was no other breach save non-submission, damages would be nominal: *ibid.*, [1909] 1 Ch., at p. 689; *Kilbey* v. *Havilland*, [1871] W. N. 47; but an injunction will be granted if the buildings are such that the surveyor would not have approved them, either as to their design, or their position: *Goolden* v. *Anstee*, 18 L. T. 898. It is entirely within the discretion of the person to whom the plans are to be submitted to approve or disapprove them; and the doctrine of derogation from grant

cannot be invoked by his lessee to compel him to disapprove: *Master* v. *Hansard*, 4 Ch. D. 714. If the covenant does not expressly require the person submitting plans to pay the fees of the surveyor, a provision requiring him to do so will not be implied, unless the other party plainly proves a custom that he should do so: *Reading Industrial Co-operative Society* v. *Palmer*, [1912] 2 Ch. 42.

29. *Buildings.*

A covenant not to erect any buildings other than certain specified ones, or to erect no buildings on a specified part of the land (as in *Mann* v. *Stephens*, 15 Sim. 377), or in front of a prescribed building line, may be broken by additions or extensions to existing buildings, as well as by complete new ones.

In *Western* v. *Macdermott*, L. R. 1 Eq. 499; 2 Ch. 72, the "building" complained of was a bay window, 8 feet deep at its deepest, from the basement to the attics. In *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715, it was a portico, though there there was also a covenant not to alter the existing buildings. Where the covenant forbade buildings in front of a building line, a 3-foot bay carried from foundation to roof was a breach: *Manners* v. *Johnston*, 1 Ch. D. 673.

A building need not be composed of bricks and mortar. In *Long Eaton Recreation Grounds Co.* v. *Midland Ry.*, [1902] 2 K. B. 574, the defendant company took under statutory powers land which was subject to covenants not to "erect . . . any erection or building of any kind" in front of the building line, and not to "erect any building on the land . . . other than private dwelling-houses". The defendant company built an embankment on the land which came in front of the building line. The main question was whether breach of a restrictive covenant was a ground for compensation under the Lands Clauses Consolidation Act, 1845, s. 68, to which the answer was in the affirmative (see III, 18), but the Court of Appeal upheld Lawrance, J.'s, view that a breach had been committed of one or both the covenants. Collins, M.R., said, at p. 581: "If, however, it is necessary to say whether a railway embankment can be covered by the word building, I see no reason for saying that it cannot. A building is not necessarily limited to a structure of bricks and mortar." Its permanence was, however, material, and made it at any rate an erection: see *per* Cozens-Hardy, L.J., at p. 588.

A covenant not to erect "more than two dwelling-houses",

however, will probably be construed restrictively. In *Hawes* v. *Scott*, 40 S. J. 373, a high wall, built to secure privacy, was held by the Court of Appeal (A. L. Smith, L.J., *dissentiente*) not to be a breach; the covenant meant that *dwelling-houses* were to be restricted to two. Similarly, in *Chambers* v. *Randall*, [1923] 1 Ch. 149, Sargant, J., thought that the erection of four lock-up motor garages was not a breach of a covenant that every dwelling-house to be erected should cost a specified sum.

Nor need a "building" contain an air-space. A hoarding 156 feet by 15 feet for the display of advertisements was a building : *Nussey* v. *Provincial Billposting Co.*, [1909] 1 Ch. 374; cf. *Pocock* v. *Gilham*, 1 Cab. & El. 104; *Stevens* v. *Willing & Co., Ltd.*, [1929] W. N. 53. Walls are also buildings : but the defendant may resist the remedy by mandatory injunction if his wall is a mere fence : *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, at p. 661. This course, however, is not open to the defendant if he erects a very high wall (*Child* v. *Douglas*, 1 Kay 560; 5 D. M. G. 739), or a wall supporting a lean-to vinery (*Bowes* v. *Law*, L. R. 9 Eq. 636), or a stout trellis to secure privacy (*Wood* v. *Cooper*, [1894] 3 Ch. 671) : see VI, § 4. The context may, however, restrict "building" to one enclosing an air space; thus the erection of a hoarding has been held no breach of a covenant that any building to be erected should be of a specified height with a stucco front and a slated roof and should be used only as a dwelling-house : *Foster* v. *Fraser*, [1893] 3 Ch. 158.

30. *Outbuildings.*

A lavatory attached to a house, but with no interior access therefrom is an outbuilding: *Powell* v. *Hemsley*, [1909] 1 Ch. 680; 2 Ch. 252, where the lavatory complained of was in front of the premises, and so was not within the permitted exemption of "outbuildings in the rear". A public lavatory is not a "shelter": *Stourcliffe Estates Co., Ltd.* v. *Bournemouth Corporation*, [1910] 2 Ch. 12.

31. *House and dwelling-house.*

A "house" means a building intended for "some purposes of habitation". Accordingly the erection of a corrugated iron shed for use as a classroom was a breach of a covenant against user of any house otherwise than as a private dwelling-house : *Reckitt* v. *Cody*, [1920] 2 Ch. 452, notwithstanding that in that case the shed was not affixed to the freehold, but rested on dwarf walls, and that the local authority had only permitted its erection on terms that

they could order its removal on three months' notice (*g*). Similarly in *Patman* v. *Harland*, 17 Ch. D. 355, a separate studio for an art college was a dwelling-house.

A bungalow was defined in *Ward* v. *Paterson*, [1929] 2 Ch. 396. It is a building of which the walls with the exception of any gables are no higher than the ground floor, and of which the roof starts at a point substantially not higher than the top of such walls. It is not necessarily a flimsy structure. It may contain one or more rooms inside the roof-space, and it is immaterial whether such rooms are used for habitation or not.

But the usual appurtenances of a residence (for example, stables) are not a breach of a covenant to erect private dwelling-houses only : *Russell* v. *Baker*, 18 W. R. 1021 ; nor even if they are erected before the house is : *Blake* v. *Marriage*, 9 T. L. R. 569.

For tax purposes it is possible to have more than one " house " under one roof. See *Grant* v. *Langston*, [1900] A. C. 393 ; *Att.-Gen.* v. *Mutual Tontine Westminster Chambers Association, Ltd.*, 1 Ex. D. 469 ; similarly for purposes of the Rent Restriction Acts : see *Fordred* v. *Barrell*, [1931] 2 K. B. 257.

32. *Value and cubic content.*

In cases where a covenant provides that no house shall be erected of less than a stated value, the answer to the question whether a building containing two dwelling-places is one house or two depends mainly on whether there is or is not internal communication. Thus in *Kimber* v. *Admans*, [1900] 1 Ch. 412, a block of residential flats was held only to be one house for the purpose of such a covenant, while in *Ilford Park Estates, Ltd.* v. *Jacobs*, [1903] 2 Ch. 522, a building consisting of two tenements, with separate entrances and no internal access from one to the other, was held to be two houses. But to open internal communication between two houses, built as separate ones, does not turn them into a single house: *Snow* v. *Whitehead*, 51 L. T. 253. Covenants sometimes impose a different minimum price for single houses and pairs of semi-detached houses. Where this is so, and a single house is erected costing less than the minimum for single houses in pursuance of a plan for providing a pair of a proper value, the builder will have a reasonable time in which to complete his plan : *Knight* v. *Simmonds*, [1896] 1 Ch. 653 ; 2 Ch. 294. Where the

(*g*) Conversely, in *Chamberlayne* v. *Collins*, 70 L. T. 217, a switchback railway infringed a covenant against placing on the land any " hut, tent, shed, caravan, house-on-wheels, or other chattel ". It was attached to the land, but " only . . . for its more convenient use as a chattel ". It also infringed a covenant against the placing of " operative machinery " on the land, although, apparently, no engine was used : see also *Domvile* v. *Colville*, 7 Ir. R. C. L. 68.

covenant fixes a minimum price, the figure so fixed continues to be binding, notwithstanding that building costs have so fluctuated since the date of the covenant that a building which complies with it is one of a character quite different from that intended : *Grant* v. *Derwent*, [1928] Ch. 902. Consequently, the character of the neighbourhood may be more effectively kept up by covenants precluding the erection of houses of less than a given cubic content : *Drake* v. *Gray*, [1936] Ch. 451.

33. *Private dwelling-house : private residence.*

Covenants requiring the premises to be used as a private dwelling-house only, or for private residence only, relate to the activities of the occupants, rather than to the structure, and can be considered as of similar effect to covenants against the carrying on of any trade or business on the land. Their effect is not, however, identical, for if the covenant forbids any user except as " a private dwelling-house wherein no business is carried on ", the latter words add to the stringency of the former : *per* Eve, J., in *Barton* v. *Keeble*, [1928] Ch. 517, at pp. 523-4. And in *Willé* v. *St. John*, [1910] 1 Ch. 84, 325, it was assumed that a church was not a private dwelling-house without deciding that it was a place of business; see also *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208. Such covenants are obviously broken by user for a hotel (*Spicer* v. *Martin*, 14 App. Cas. 12) or as a shop (*Northbourne* v. *Johnston & Son*, [1922] 2 Ch. 309).

User as a school for 100 girls is not user for a " private residence only " : *German* v. *Chapman*, 7 Ch. D. 271; nor is user for the boarding of governesses and pupils, as part of a school half-a-mile away : *Hobson* v. *Tulloch*, [1898] 1 Ch. 424. Similarly, a house where a doctor had patients under her care is not used for private residence only : *Kelly* v. *Barrett*, [1924] 2 Ch. 379. Nor is an office for taking orders for coal a " private dwelling-house ", even if no coal is kept on the premises : *Wilkinson* v. *Rogers*, 12 W. R. 119.

User as a club infringed the covenant to use as a private dwelling implied against the owner of a block of flats : *Hudson* v. *Cripps*, [1896] 1 Ch. 265; and in a similar case letting off part of the block as offices to a Government department was restrained: *Gedge* v. *Bartlett*, 17 T. L. R. 43.

But, as in the case of covenants prohibiting businesses directly, a single act may not be a breach. Thus in *Reeves* v. *Cattell*, 24 W. R. 245, an auction sale of the household effects was held not a breach of a covenant to use as a private dwelling-house only. " It would be a different thing if furniture was brought

to the house for the purpose of being sold there": *per* Jessel, M.R.

34. *Flats.*

The letting of rooms, suites or flats may be a breach of such a covenant in two ways. It may amount to a business if the person so letting undertakes the provision of services or retains control of part of the premises: see § 4, *supra*; or the covenant may require the premises to be used as a *single* dwelling-house, in which case occupation by a number of families is a breach irrespective of the provision of services or the retention of control.

The conduct complained of in *Barton* v. *Reed*, [1932] 1 Ch. 362 (fully set out *supra*, § 4) would no doubt have been a breach of a covenant to use for private residence only had that covenant affected the premises in question. *A fortiori*, in *Thorn* v. *Madden*, [1925] Ch. 847, the defendant was liable, where paying guests were systematically taken in; the defendant retained possession of the whole house, and provided all services. But in *Porter* v. *Gibbons*, 48 S. J. 559, it was no breach to receive friends and their families, who merely contributed a share of the household expenses.

In *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, the defendant proposed to erect a block of flats on a plot of land which was subject to a covenant that only one dwelling-house should be erected thereon, and that it should be used for a private residence only. The proposed block comprised between thirty and forty flats, all self-contained, but with a common entrance from the street. This was a clear breach notwithstanding that the defendant disclaimed any intention to provide hotel services for the occupants. Farwell, J., relied on the tax cases cited above (§ 31), and held that it was impossible to distinguish between a terrace of adjoining houses and a "pile of residences".

But the express restriction to *one* private dwelling-house is not essential: a covenant that the premises should be used only for *a* private dwelling-house has the same effect. In *Berton* v. *Alliance Economic Investment Co.*, [1922] 1 K. B. 742, and in *Berton* v. *London and Counties Home Property Co.*, unreported, referred to *ibid.*, at p. 758, letting houses in separate tenements to weekly tenants was a breach of this covenant: see also *Day* v. *Waldron*, 88 L. J. K. B. 937.

In *Barton* v. *Keeble*, [1928] Ch. 517, the case could be put against the defendants in both ways. For the only letting was of the top floor unfurnished : so that possession of part was retained; and the covenant was for user as *a* dwelling-house only : so that the residence of a second family was a breach.

It would appear, however, that if land was subject to a covenant against user except for the purpose of private residence, or for user as private dwelling-houses only (as in *Willé* v. *St. John*, [1910] 1 Ch. 84, 325), control or service would have to be proved against the defendant : there would be no indefinite article whence the restriction to *one* residence could be implied.

35. *Alterations to premises.*

Covenants against "alteration" of buildings are broken by permanent alterations. Thus in *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715, the addition of a portico to the front of the house was such a breach; and so was opening a window in a wall formerly blank : *Sharp* v. *Harrison*, [1922] 1 Ch. 502. Similarly, making doorways in a party wall may be an alteration : *British Empire Mutual Life Insurance Co.* v. *Cooper*, 4 T. L. R. 362; so also is conversion from a single dwelling-house into flats, if it involves new partition walls and new doorways : *Day* v. *Waldron*, 88 L. J. K. B. 937.

But some less permanent alterations may also amount to breach of such a covenant. In *Heard* v. *Stuart*, 24 T. L. R. 104, a wall was let to a bill-posting company for advertising, and this was held a breach of a covenant not to make any alteration in the external appearance. Again, the addition of an electrically-lit advertisement, secured by bolts, and involving removal of part of the moulding on the wall, was a breach of a covenant not to alter the elevation (*h*) : *L. C. C.* v. *Hutter*, [1925] Ch. 626; cf. *Pocock* v. *Gilham*, 1 Cab. & El. 104. But where the covenant was not to make alteration to the elevation or architectural decoration, it was held that a large iron framework to hold electric signs, resting on the cornice, and fixed to but not driven into the ornamental stonework was not an alteration : *Joseph* v. *L. C. C.*, 111 L. T. 276. Nor was a large illuminated clock erected outside a watchmaker's shop contrary to a covenant not to make any alteration to the premises : *Bickmore* v. *Dimmer*, [1903] 1 Ch. 158 (*i*). It is plain that a strict view of this covenant would include the most trifling additions to the premises, and the two last-mentioned cases both

(*h*) But a covenant not to permit any alteration in the *lay-out* was not broken by the natural growth of trees already planted at the date of the covenant : *Crawley* v. *Wolff*, 4 T. L. R. 434.

(*i*) An illuminated sign was a breach of a covenant not to allow any placards, posters, or advertisements (other than plates or other similar announcements) to be fixed to the premises; it was not excepted as a "plate" : *Gifford* v. *Dent*, [1926] W. N. 336. Similarly a roller blind and a brass plate, both inscribed "H. B. & Co." infringed a covenant against "outward mark or show of business" : *Evans* v. *Davis*, 10 Ch. D. 747.

proceeded on the ground that the covenants there must be restricted to alterations to the fabric. Again, in *Gresham Life Assurance Society, Ltd.* v. *Ranger*, 15 T. L. R. 454, the defendant kept the outside blind of his shop permanently lowered, which obscured the view obtained by passers-by of his neighbours' displays. There was held to be no alteration of the external appearance. Cf. Settled Land Act, 1925, 3rd Sched., Pt. I (xxiii), and cases thereon.

"Conversion" into a shop may also require a structural alteration. In *Wilkinson* v. *Rogers*, 12 W. R. 119, the defendants' liability depended on whether the plaintiff had "converted" adjoining premises into a shop so as to bring a proviso into operation. It was held that he had not, although he had let them to a photographer : he had not altered them structurally.

36. *Continuing breach.*

Some covenants admit of no breach but a continuing one: thus most covenants against trades and businesses are not broken by single acts. The breach of some other covenants, however, must be a single operation, notwithstanding that the results of the breach remain upon or permanently affect the land. In both *Gaskin* v. *Balls*, 13 Ch. D. 324, and *Powell* v. *Hemsley*, [1909] 1 Ch. 680; 2 Ch. 252, the defendant came into possession of land, whereon stood buildings, which had been erected in breach of a covenant forbidding their *erection*. In neither case was he liable for allowing them to remain. A covenant not to erect, unlike a covenant not to keep or maintain, is broken once for all by the erection.

Some covenants not to erect, however, may be construed in the circumstances as implying a further negative stipulation that infringing erections shall not be maintained. Where this is so the maintenance of such an erection is a continuing breach. Thus in *Bray* v. *Fogarty*, 4 Ir. Eq. 544, there was a covenant in a lease that a house to be built on the land should be "fit for a private family" under penalty of £10 additional rent, unless the lessor should convert his adjoining house to any "public use". The Court implied a negative covenant not to use the building so erected otherwise, and restrained its conversion into a public-house. Similarly in *Webb* v. *Faggotti*, 83 L. T. 257, land was sold subject to stipulations, one of which was : "except on lots marked 'tavern lots' no hotel tavern public house or beerhouse shop or other building for sale of" liquors "shall be built". Here again the Court was prepared to interpret the covenant as meaning that no

such building was to "be" on the lots not marked as "tavern lots": cf. *Andrew* v. *Aitken*, 22 Ch. D. 218 (*k*).

But in *Holford* v. *Acton U. D. C.*, [1898] 2 Ch. 240, "surplus lands" were put up for auction by the Acton Local Board subject (*inter alia*) to the stipulation that on plots 3-7 shops and dwelling-houses of a stated value should be erected within two years. These plots were unsold, and the defendants, being successors in title to the Local Board, proposed to put up a fire-station. The plaintiff was the purchaser of another lot at the auction, and attempted to restrain the erection of the fire-station on the grounds that the unsold plots were bound by the stipulations, and that a further stipulation ought to be implied that nothing but shops and dwelling-houses should stand upon them. It was held that no negative covenant to use the plots only for shops or dwelling-houses ought to be implied. The Court was prepared to imply a covenant as to the value of buildings, but that was satisfied by the erection of the fire-station at a cost which exceeded the total value required by the stipulation for all four plots. Stirling, J., reached this conclusion after applying the test laid down by Bowen, L.J., in *Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518, at p. 527: "where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual". Similarly, in *Wright* v. *Berry*, 19 T. L. R. 259, the buildings were structurally in conformity with the covenant, and the Court refused to imply a covenant as to user. It appears to be the rule that a strict construction is to be applied to covenants.

Again, a covenant not to *let* for a particular trade (*l*) does not imply a covenant not to *use* for the trade: *Kemp* v. *Bird*, 5 Ch. D. 549, 974, followed in *Ashby* v. *Wilson*, [1900] 1 Ch. 66, and *Brigg* v. *Thornton*, [1904] 1 Ch. 386. In all three cases the plaintiff failed, against the lessee, to prevent the *user* of the premises for the business, the lessor having committed no breach of the covenant not to *let* for it. In *Fitz* v. *Iles*, [1893] 1 Ch. 77, the right of the plaintiff lessee to sue the defendant lessee as well as defendant lessor was held not to be in controversy, but the case has not been followed on this point. Further, an implied

(*k*) But where, conversely, the covenant was only against *user* for certain purposes, the Court of Appeal refused an injunction against the erection of a circus, though its user as such would plainly be a breach: *Worsley* v. *Swann*, 51 L. J. Ch. 576.

(*l*) A covenant not to let "adjoining premises" for a particular trade does not attach to land acquired by the covenantor after the date of the covenant: *Buckel* v. *King*, 40 S. J. 50.

covenant not to use, follows less easily from a covenant not to *let* (which looks only to landlords) than from a covenant not to *erect* (which binds all persons in possession). A covenant not to let does not compel the lessor to sue the lessee: see *infra*, §§ 37-41.

### D. *Vicarious Liability.*

#### 37. *Vicarious Liability.*

*Prima facie* a covenantor is under no liability for the acts of other persons, unless they are his servants or agents. Thus, even if the trustee in bankruptcy of a lessee disclaims the lease so as to throw the land back upon the lessor, the lessor will not be liable for a breach of covenant committed by the lessee, provided it is not a continuing one which he allows to continue: *Powell* v. *Hemsley*, [1909] 1 Ch. 680; 2 Ch. 252; *Devonshire* v. *Simmons*, 11 T. L. R. 52; *Clements* v. *Welles*, L. R. 1 Eq. 200.

#### 38. "*Permit*" *and* "*suffer*".

But some vicarious liability may be imposed by the words of a particular covenant, especially by the use of one or both of the words "*permit*" and "*suffer*". If these words are used, the covenantor and his assigns can be made liable, otherwise than by agency, if some degree of participation in the breach, or some degree of forbearance towards the person committing it, be shown.

In *Hobson* v. *Middleton*, 6 C. & P. 295, at p. 303, it was said that a man bound not to permit or suffer something is thereby bound "not to concur in any act over which he had a controul". And in *Barton* v. *Reed*, [1932] 1 Ch. 362, at p. 375, Luxmoore, J., said: "The word in the case before me is 'suffer', and at any rate that must cover allowing something to be done which the covenantor has the complete power to prevent." These two different modes of breaking such a covenant have been united in one definition by Atkin, L.J. After refusing to distinguish between the two words, he said: "To my mind the word *permit* means one of two things, either to give leave for an act, which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act when it is within a man's power to prevent it"; and as to "reasonable steps" he added: "I am inclined to think that in certain circumstances a man may permit the continuance of an act if he can prevent it by taking legal proceedings and refrains from doing so": *Berton* v. *Alliance Economic Investment Co.*, [1922] 1 K. B. 742, at pp. 759, 761. The application of the second branch of the definition, however, is subject to the different treatment which must be accorded to

cases where there is no privity of contract or of estate between the plaintiff and the defendant who is alleged to have permitted or suffered.

In a particular case the words permit and suffer may have different meanings. Primarily there is no difference between them : see *per* Atkin, L.J., in *Berton* v. *Alliance Economic Investment Co.*, [1922] 1 K. B. 742, at p. 759. But in the leases granted by the Governors of Dulwich College, which came before the Court in that case, in *Barton* v. *Keeble*, [1928] 1 Ch. 517, and in *Barton* v. *Reed*, [1932] 1 Ch. 362, for example, the words were used sometimes in conjunction and sometimes separately in apparent contradistinction. In the last-mentioned case Luxmoore, J., was prepared to give effect to the difference (at p. 375), and it is plain that if there is any difference in a particular case, it is suffer which is the wider term. (For " wilfully suffer " see *Bryant* v. *Hancock*, [1899] A. C. 442.)

For convenience the defendant who is alleged to have committed a breach by permitting or suffering is called the first defendant (which he usually is), and the person whose acts are complained of is called the second defendant.

39. *Participation in breach.*

Under the first branch of Atkin, L.J.'s, definition fall not only cases where the first defendant has given a necessary consent, but also the stronger cases where he has himself encouraged the breach.

In *Ives* v. *Brown*, [1919] 2 Ch. 314, the freeholders were held liable for breach of covenants not to carry on or *permit or suffer* to be carried on any business but that of a coal merchant, and not to *permit* anything which would be a nuisance or annoyance, because they demised the premises for the express purpose of carrying on a taxi-cab and char-à-banc business. Similarly, a sub-lease made expressly for a trade held to be dangerous was a breach of a covenant not to *permit* any dangerous trade to be carried on or to *suffer* anything to be done which would increase the fire insurance premium : *Teape* v. *Dowse*, 92 L. T. 319; cf. *Cave* v. *Horsell*, [1912] 3 K. B. 533; *Wilkinson* v. *Rogers*, 12 W. R. 119. And the approval of building plans was held to be a *permission* to erect the building : *Ricketts* v. *Enfield Churchwardens*, [1909] 1 Ch. 545.

In *Evans* v. *Davis*, 10 Ch. D. 747, the defendant Davis agreed with the plaintiff for an underlease covenanting " not to do or permit to be done any act " in contravention of the terms of the head lease. He let two rooms, and his tenant committed a breach of one of the covenants in the head lease. Davis was held liable

because he had given a licence to his tenant *so far as he was able to give the same*, and because he still retained possession of part of the premises.

*A fortiori* where a defendant retained control of part of the premises and let the remainder to a person who carried on a business in breach of covenant, using the defendant's own business name : *Atkin* v. *Rose*, [1923] 1 Ch. 522.

40. *Consent to breach.*

But such active participation is not essential : consent by itself may suffice, if the act cannot be legally done without it (*m*).

The final result of the much-litigated case of *Tolcman* v. *Portbury*, L. R. 5 Q. B. 288; 6 Q. B. 245; 7 Q. B. 344, was in the plaintiff's favour. A lease contained a covenant by the lessee not to *permit* an auction sale on the premises. The lessee's financial difficulties led him (1) to charge the chattels on the land by a bill of sale, which upon its true construction was held to give the chargees a power to enter and sell the chattels by auction on the land; (2) to charge the lease by way of sub-demise; (3) to execute a deed of assignment for the benefit of his creditors. An auction sale was held on the premises under the express power, and it was finally held that a forfeiture was incurred thereby. The lessee had given the licence for it to be held there in certain circumstances (which had happened), and he could not rely on either (2) or (3) to defeat it since he was in fact still in possession. At an earlier stage Cleasby, B., had said that "a positive act . . . permitting the sale" was required : 5 Q. B., at p. 296; and this was found in the execution of the bill of sale. It is otherwise if a man cannot prevent the act : a covenantor was held not to have permitted a railway company to commit a breach where his land was taken under compulsory powers : *Bailey* v. *Crespigny*, L. R. 4 Q. B. 180. His submission to the law and execution of the deed of conveyance was insufficient : at p. 184. (For the application of the principle to a covenant for title, see *Hobson* v. *Middleton*, 6 C. & P. 295.)

It is not clear upon the authorities to what extent a lessor can be made liable, where he imposes no restrictions upon his lessee, and the lessee does something which the lessor is bound not to permit. In such a case it appears that the lessor cannot be said to have consented to any activity upon which the lessee may choose to embark, and *ex hypothesi* he lacks the power to restrain him. But *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715, suggests that

(*m*) But a person bound only in equity is not liable for acquiescence in a state of affairs which it costs money to prevent, such as the natural growth of trees : *Crawley* v. *Wolff*, 4 T. L. R. 434.

he can be said to consent. There the plaintiff failed to obtain forfeiture, but only upon the ground that the right of re-entry arose "if" the lessee . . . "shall *make default in performance* of" the covenants. The sub-lessee committed a breach of a covenant in the head lease by erecting a portico, and it was held that the head lessor could not re-enter under this proviso for breach of covenants not to *permit* alterations or *suffer* buildings to be erected in the garden. It was, however, assumed that if the proviso had been in a less narrow form the plaintiff could have re-entered. In *Wilson* v. *Twamley*, [1904] 2 K. B. 99, the licence of a public-house was lost through an act of the sub-lessee. The first defendant had, however, imposed upon him terms at least as stringent as those in the head lease, and this fact was relied on for the decision that the act had not been *suffered* by the first defendant.

On the other hand, in *Feilden* v. *Slater*, L. R. 7 Eq. 523, James, V.-C., dismissed the bill against the first defendant, saying at p. 531 : "He had no power of restraining Sefton, and must have failed in any attempt to do so, because Sefton was no party to the original covenant . . . he did all that lay in his power to induce Sefton to discontinue." He had not, however, imposed any restrictions upon Sefton as to his user of the premises. The authority of this case is somewhat lessened by the fact that the only authority cited on behalf of the first defendant was *Clements* v. *Welles*, L. R. 1 Eq. 200, where there were no words at all to impose vicarious liability on the first defendant.

Further, in some of the cases which follow, the first defendant was required actually to sue the second defendant: it would be unreasonable if he could escape liability by putting it out of his power to sue him. Where the first defendant is bound only in equity, however, it would appear immaterial whether he has reserved power to restrain the second defendant or not, since he cannot be required to restrain him by any positive act: *Prothero* v. *Bell*, 22 T. L. R. 370; see *infra*, § 41.

41. *Failure to take legal action.*

Under the second branch of Atkin, L.J.'s, definition fall cases where the most that can be urged against the first defendant is that he has not taken the appropriate legal action against the second defendant (*n*).

In cases where there is privity of contract or of estate between

(*n*) A covenant to take legal action when required to do so, as was found in *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610; [1938] Ch. 351, could not be other than personal.

the plaintiff and the first defendant, the latter's liability on the covenants is at law, and there is consequently no objection to his being required to spend money in performance of them. The cases cited deal with actions for forfeiture of head leases, where it is essential to make the person entitled to the head lease liable. But similar considerations must apply in cases relating to freehold land where the first defendant is the original covenantor, and where it is material to make him liable on the ground of the second defendant's insolvency or to obtain damages (*o*); there is in such a case privity of contract, though not of estate. In such cases there is no reason why full effect should not be given to the definition of Atkin, L.J.

In *Berton* v. *Economic Alliance Investment Co.*, [1922] 1 K. B. 742, itself, the plaintiffs let premises for eighty years and the defendants were assigns of the lease. The lease contained covenants not to use the premises or *permit* them to be used except as a private dwelling-house, nor to *suffer* anything to be done which might be an annoyance, etc. In proceedings for forfeiture it was proved that the defendant's underlessee had, in breach of a covenant in his underlease, let the house off in tenements to weekly tenants and that the defendants had obtained an order against him for ejectment. They had not, however, joined the weekly tenants, who relied on the Rent Restriction Acts; and they had sympathised with them, particularly by suggesting an application under Housing, Town Planning, etc., Act, 1919, for the conversion of the house into tenements. The Court of Appeal, overruling Coleridge, J., found for the defendants. The onus was on the plaintiffs to prove the permission; sympathy did not amount to it, and there was no evidence that they deliberately abstained from joining the weekly tenants. Atkin, L.J., defined the word "permit" as stated above; but it was held that in that case the doubt as to the result of the proceedings relieved the defendants from the necessity of taking them.

In *Atkin* v. *Rose*, [1923] 1 Ch. 522, however, the first defendant was held to have permitted in this way. Premises were let to Rose, who covenanted not to exercise or *permit or suffer* to be exercised thereon any trade or business but that of a bag maker,

(*o*) It may be impossible to succeed against the person in possession; for example, if a covenant made after 1925 is not registered as a Land Charge. Moreover, if the covenants are contained in a lease they are not registrable: cf. *Ricketts* v. *Enfield Churchwardens*, [1909] 1 Ch. 595; *Stuart* v. *Diplock*, 43 Ch. D. 343. In such cases damages are obtainable against a first defendant who is the original covenantor, but the injunction will be a somewhat qualified one: see *Sharp* v. *Harrison*, [1922] 1 Ch. 503.

and not to assign or underlet without leave. Rose then sub-let to Cohen with leave, taking a similar covenant, except that (with the lessor's consent) "tobacconist" was substituted for "bag maker", and taking also a covenant against assigning or underletting without the consent both of Rose and the superior landlord. Cohen sub-let without leave to Goodman for use only as a hairdresser, and the latter opened a hairdresser's business. The plaintiff, who had acquired the freehold reversion, sued Rose and Cohen. Rose, as original lessee, was liable because he could prevent the user by legal action to which there could be no defence, "and there are no facts which would render it unreasonable for the defendant Rose to bring an action against the defendant Cohen, which could have but one result": *per* P. O. Lawrence, J., at p. 533. Similarly, in *Barton* v. *Reed*, [1932] 1 Ch. 362, the first defendant, who was an assign of the head lease, was held to have *suffered* her underlessee to have committed clear breaches, when she took no steps to prevent them by proceedings or otherwise. "If she had taken those proceedings there would have been no doubt whatever as to their result": *per* Luxmoore, J., at p. 380. In this case the learned Judge thought suffer to be a wider word than permit, but it appears that the first defendant there would have been liable even if the word permit had been used, on the principle laid down by Atkin, L.J.

But where there is no privity of contract or of estate between the plaintiff and the first defendant, the latter can only be liable under *Tulk* v. *Moxhay*, 2 Ph. 774. Hence it follows that no positive act can be required of him by the words permit and suffer or any other words, and in particular he cannot be required to take legal action against the second defendant, with the expense and trouble inseparable from even the simplest legal proceedings.

In *Hall* v. *Ewin*, 37 Ch. D. 74, the plaintiff let premises to T, taking from him a covenant not to use the premises, or to *permit* or *suffer* them to be used, for a noisome or offensive business. The first defendant was an assign of an underlease, and so there was no privity of estate between him and the plaintiff. The second defendant was a tenant of the first defendant, and carried on a business admittedly offensive, contrary to covenants in his own tenancy agreement as well as in the head lease. He could accordingly have had no defence to an action by the first defendant, but this fact was not enough to make the first defendant liable to the plaintiff for permitting or suffering the breach. The first defendant was able to disprove any participation in the breach by evidence that he had required the second defendant to discontinue the business, and had received an untruthful answer

that it would be discontinued, though the onus of proving his participation would of course be on the plaintiff.

It would appear that not even the positive act of protesting could be required of the first defendant in such a case, and evidence of it is material only to negative participation. If, however, participation or the giving of consent can be proved against such a first defendant, he is liable: see *Ives* v. *Brown*, [1919] 2 Ch. 314.

(*To be continued.*)

## A CASE ON CONCURRENT INTERESTS IN LAND.

Years of study and experience of the Law of Property Act, 1925, have left with the writer the impression that the sections of the Act dealing with concurrent interests present some of the most difficult problems of that rather complicated series of statutes. Section 34 (2) provides: " Where . . . land is expressed to be conveyed to any persons in undivided shares ": generally speaking the effect of the conveyance is to vest the land in the grantees or the first four of them as joint tenants on the statutory trust for sale. Section 36 (1) provides: " Where a legal estate . . . is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale." Though analogous provisions the wording of these sections, therefore, is markedly different. Analogous provisions with different wording have in other cases under the Acts received close scrutiny, but it is thought that this has not been done in any decision on these sections. For example, there is the question why the word " land " is used in section 34 and the words " legal estate " in section 36. Presumably, a conveyance " to A in fee simple upon trust for C and D in fee simple as joint tenants " would create A a trustee for sale, since there is no reference to the joint tenants taking as trustees for sale in the section. If there was a similar conveyance of a legal estate " to A in fee simple upon trust for C and D in fee simple in undivided shares ", would section 34 apply to the conveyance at all? Can it properly be said that the land is expressed to be conveyed to persons in undivided shares, though it is clearly another case if " limited to or in trust for " persons as joint tenants. If it is not expressed to be conveyed, then A would hold as a trustee not on trust for sale, since the Statute of Uses has been repealed.

Since there appears to be a steady increase in the number of concurrent interests created at the present time it is essential to be able accurately to interpret the application of these sections. Cases that concern these sections are of the first importance. In *Re Buchanan-Wollaston*, [1939] 1 Ch. 217, four persons bought a vacant plot of land which was conveyed to them as joint tenants in fee simple. The purchase-money was found in unequal shares and the parties entered into a deed of covenant which, *inter alia*, provided that the land should not

be built upon or sold without the consent of all parties, and that any profits arising from sale or lease should be divided in unequal shares. The purpose of the conveyance was to preserve the amenities of property belonging in severalty to the different parties. One party, A, sold his other property and purchased the share of another, B, which gave him a majority in value of the original purchase price. Another party, C, had died and his personal representatives were joined as respondents to the summons. A wished to sell the land, but the remaining party, D, opposed this, and the summons was issued to compel him to join in a proposed sale.

The summons assumed that the property was vested in the parties as trustees for sale under section 36 of the Act, and this view was adopted by Farwell, J., who refused to order D to join in a sale on the ground that the sale would defeat the original purpose of the conveyance and that A was not entitled to the order as this would not in fact carry out his covenant and "he who seeks equity must do equity".

The decision raises two points of great importance. First, what interests fall within section 36 of the Act? Secondly, what is the nature of the statutory trust for sale?

It is thought that there is nothing in the new Acts which directly affects the old rules regarding the creation of a tenancy in common in equity. So, for example, in *Re Fuller's Contract*, [1933] Ch. 652, a conveyance to partners as joint tenants upon trust for themselves as part of the partnership property was held to fall within the transitional provisions affecting undivided shares. Consequently, it would appear from the facts in this case that the parties held the property beneficially as tenants in common in equity. Since this is the position the interpretation to be put upon the words "*beneficially* limited to or in trust for" becomes very material.

*Prima facie*, "beneficially", since it relates to both "limited to" and "held in trust for", would have relation to the joint tenancy. It cannot very well be said that land is beneficially held in trust for the trustee, but only for the persons who take as joint tenants. It would, therefore, seem that if land is limited to persons as joint tenants it must be limited to them as joint tenants "beneficially". This reference may, however, be to the form taken by the conveyance or to the true relation to the parties. In *Green* v. *Whitehead*, [1930] 1 Ch. 38, a question arose out of an execution under a power of attorney by one of two persons to whom the property had been limited as joint tenants. It was held on the facts that there was a trust for sale created by the effect

of section 36 and Part IV of Schedule I, being the transitional provisions relating to undivided shares. The question does not seem to have been discussed, but it would appear that there was nothing to disclose the tenancy in common on the face of the conveyance. It may be suggested, therefore, that the view being taken by the Courts is that the words " beneficially limited to " relate to the form of the conveyance. It is not clear from the facts as reported in *Re Buchanan-Wollaston* (*supra*) whether the proportions of the purchase-money were disclosed or whether the conveyance was made to them as joint tenants beneficially entitled. This is unfortunate because it may be possible to interpret the view taken either that a conveyance to persons entitled in undivided shares as joint tenants must always fall within section 36 or, alternatively, that this section will apply only where the facts constituting a tenancy in common are not disclosed in the conveyance. It would certainly be in conformity with certain aspects of the Property Legislation of 1925 to treat the position as determined by the form of the conveyance. In this respect, for example, it is diametrically opposed to the interpretation put upon the Mortmain and Charitable Uses Act, 1881, where a conveyance for a charitable purpose, though not disclosed, will render a conveyance void if the Act is not complied with. Nevertheless it remains important to determine what form the conveyance must take. For instance, is it necessary for the limitation to be to the parties " as joint tenants beneficially entitled " ?

It should be further noted that neither section 34 nor section 36 seems to apply where an express trust for sale is created. It is a common practice at the present day, when conveying to persons concurrently entitled, to express the limitation to the grantees in fee simple " upon trust for sale for themselves as joint tenants beneficially entitled " or as the case may be. It is submitted that in such a case the grant does not fall within section 36, because there is an express trust for sale and the joint tenancy operates only against the proceeds of sale as a beneficial interest. This interpretation cannot be certain where section 36 is concerned, because of the use of the expressions " legal estate " " beneficially limited to or held in trust for ". With undivided shares it is more certain because the expression is " land " and there is no question of " held in trust for ". The powers and obligations of express trustees and statutory trustees are not identical because a number of the provisions of the Law of Property Act, 1925, apply only to statutory trustees for sale. In particular it may be noted that the saving amendment to section 36 enabling a surviving joint tenant solely

beneficially to sell without appointment of a new trustee seems to be confined to the case of the statutory trust for sale and any other power to do so must be found outside the 1925 legislation.

The problem of the nature of the statutory trust for sale becomes apparent in *Re Buchanan-Wollaston* (*supra*). The use of the trust for sale as mere machinery quite divorced from the true nature of the interests of the parties cannot be better exemplified and seems to bear more relation to the legal fictions of the seventeenth century than to modern realism. A trust has always been distinguished from a power by the fact that a trust is imperative and a power discretionary. It is true that a trustee for sale has now impliedly a discretion to postpone, but unless that discretion is exercised the imperative direction has to be carried out. Here, however, statute imposes a trust for sale upon a transaction the purpose of which was inherently contrary to sale. The covenant makes it clear that sale was only to be contemplated in the event of all parties wishing it. In the ordinary way any superimposed direction inconsistent with the statutory trust would be overridden, presumably even although it would have been valid in an ordinary trust for sale: see *Bernhardt* v. *Galsworthy*, [1929] 1 Ch. 549; *Re Flint*, [1927] 1 Ch. 570; *Re Thomas*, [1930] 1 Ch. 194. So, also, where a trust for sale is imposed and consent of one of the trustees cannot be obtained to postpone the sale, the sale must take place and the trustee can be compelled to give his assent. In *Re Buchanan-Wollaston* (*supra*), however, the applicant applied to Court to order the trustee to give his consent under the Law of Property Act, 1925, s. 30, which provides that if the trustees for sale refuse to exercise their statutory powers under sections 28 and 29 of the Act " or any requisite consent cannot be obtained " the Court may order the trustees to act. As the decision went it would appear that the learned Judge took the view that the trustee-beneficiary whose consent was required by the covenant could withhold his consent and in the circumstances he was justified, so that it was not necessary to decide whether under section 30 any consent requisite to carry out a power (such as the power or duty to sell) not falling within sections 28 and 29 could be ordered under that section. It is submitted that the section appears to be limited to the powers under the two preceding sections, but in *Re Beale's Settlement*, [1932] 2 Ch. 15, an order was made for a trust for sale to be carried out without the requisite consent under section 30 together with section 57 of the Trustee Act, 1925; there were no reasons given in the judgment as reported.

It would seem that by the use of devices requiring consent it might be possible in the case of statutory trusts for sale to nullify

the effects of the trust for sale and render it little different from the ordinary power of sale; provided that the line of cases which override provisions in the creation of the interests, such as the right of pre-emption conferred in *Re Flint* (*supra*) or the power of appropriation in *Re Thomas* (*supra*), is limited to those cases in which the interest was created prior to the date of the Acts or alternatively prior to the operation of the trust for sale. But this cannot readily be reconciled with *Re House*, [1929] 2 Ch. 166, where a time postponement under an express power of sale was overridden and the devise came into operation only after 1925: cf., however, *Re Davies' Will Trusts*, [1932] 1 Ch. 530, where it was held that a construction affecting beneficial rights should be avoided as far as possible. Furthermore, the Court of Appeal seems to have felt in *Re Ryder and Steadman's Contract*, [1927] 2 Ch. 62, that a statutory trust for sale is a trust to sell, and this is consonant with the view taken by the same Court in *Re Kempthorne*, [1930] 1 Ch. 268.

An examination of these cases, therefore, may not tempt the conveyancer to try many experiments unless the circumstances are definitely peculiar. The fact remains, however, that circumstances may arise when to give effect to client's wishes such attempts may be desirable, and in the case of wills, of course, the testator may do it without professional advice. It can clearly be said that the statutory trust for sale is *sui generis*. The difficulty lies in determining how far the statutory trust is paramount to the rights created in the beneficial interests and how far the statutory trust may be nullified by conferring upon the trustees, or the beneficiaries, certain powers of obstruction rendering them capable of preventing the execution of the trust to sell. For example, if a house is bought in the joint names of husband and wife as joint tenants upon the statutory trusts and the parties separate, an interesting question may arise when one of the joint tenants wishes to retain and the other to sell the property, as may easily happen. It might be convenient in the light of this case to add to the common form conveyance a provision that the sale shall not take place without the consent of both parties, though such a provision might in some cases make necessary some delicate explanation of its purpose. It is felt that practitioners will need to watch these decisions with great care. The nature and effect of this statutory trust for sale may considerably affect that increasing number of transactions which fall within the provisions of the Acts.

# NOTES OF RECENT CASES.

## 1. *CONVEYANCING AND REAL PROPERTY CASES.*

*Annuity in commutation of tithe rentcharge—recovery by action of debt—Tithe Act*, 1918, *s.* 4—*Law of Property Act*, 1925, *s.* 121.—The short point in *Public Trustee* v. *Scarr*, [1939] 1 All E. R. 188, was that an action lies to recover an annuity into which tithe-rentcharge has been commuted by an order of the Minister of Agriculture and Fisheries under the Tithe Act, 1918, s. 4. Before the Real Property Limitation Act, 1833, s. 36, abolished real actions, a real action would lie for recovery of a rentcharge in fee if the grantee had once received part of it, but that higher remedy having been abolished, an action of debt is maintainable against the tenant of the land, other than a tenant for years: *Thomas* v. *Sylvester* (1873), L. R. 8 Q. B. 368; *Christie* v. *Barker* (1884), 53 L. J. Q. B. 537; *Re Herbage Rents Charity*, [1896] W. N. 88.

The argument in the case noted that there the only remedies were those given by section 121 of the Law of Property Act, 1925, substantially re-enacting the Conveyancing Act, 1881, s. 44, was rejected by Hawke, J., who followed *Searle* v. *Cooke* (1890), 43 Ch. D. 519, where the Court of Appeal had held that rentcharges arising on the enfranchisement of copyholds were recoverable by action of debt, in spite of the fact that the remedies conferred by section 44 of the Act of 1881 were also applicable by virtue of the Copyhold Act, 1887, s. 16.

M. E. B.

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*Voluntary settlement—after-acquired property clause—covenant for further assurance—enforcement by trustees.*—In *Re Kay's Settlement*, [1939] 1 All E. R. 245, a voluntary settlement contained the usual covenant to settle after-acquired property and also an assignment of the settlor's share of a sum of £20,000 over which her mother had a power of appointment, by which she subsequently appointed a share to the settlor. The assignment operated as a covenant by way of further assurance to assign the share appointed to the settlor, but this covenant and the after-acquired property clause, to which other property to which the

settlor became entitled was subject, were not performed. After the date of the settlement the settlor had married, but the three children of the marriage, although beneficiaries under the settlement, were for the purposes of the settlement volunteers, because there was no marriage consideration within which they could be included. There were no beneficiaries under the settlement who could take proceedings to compel the performance of either of the covenants or to recover damages for the settlor's failure to implement the covenants, but the trustees of the settlement issued a summons asking whether they ought to do so.

The present case differs from *Re Pryce*, [1917] 1 Ch. 234, only in the fact that in the latter although there existed marriage consideration the only surviving beneficiaries were not within its scope, whereas in *Re Kay's Settlement* (*supra*) the settlement was purely voluntary. In *Re Pryce* (*supra*), Eve, J., avoided giving indirectly to the volunteers the relief which they could not obtain by direct procedure, by refusing to direct the trustees to take steps either to compel performance of the covenant or to recover damages for breach of it, and Simonds, J., reached the same conclusion in the case noted.

*Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609, was similar to *Re Pryce* (*supra*), and those two cases and *Re Kay* (*supra*) should be contrasted with *Pullan* v. *Koe*, [1913] 1 Ch. 9, where in an ante-nuptial settlement there were children of the settlor who were consequently beneficiaries within the marriage consideration, with the result that the trustees were entitled and bound to enforce the after-acquired property clause against the executor of the settlor. **M. E. B.**

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*Settled land—persons entitled in undivided shares on death of tenant for life—rights of personal representative of testator as trustee of settlement to call for the legal estate—Settled Land Act*, 1925, *ss.* 30 (3), 36 (1).—In *Re Thomas*, [1939] 1 All E. R. 379, under a settlement created by will before 1926, land was held in trust for the testator's wife for life, and, subject thereto, for his surviving children in equal shares. The tenant for life died intestate and the administrator of her estate, in whom, as was agreed, the settled land vested on the death of the tenant for life, was made respondent to a summons issued by the administrator *cum testamento annexo* of the testator's estate. It was also agreed that on the death of the life tenant the settlement came to an end, the land then becoming subject to a trust for sale. The applicant contended that, by virtue of section 30 (3) of the Settled

Land Act, 1925, he was, until other trustees were appointed, trustee of the settlement for the purposes of the Settled Land Act and, although unable to act without appointing an additional trustee, was entitled under section 36 (1) of the Act to an order directing the administrator of the estate of the tenant for life to assent to the vesting of the legal estate in the land in the applicant.

Section 30 (3) of the Settled Land Act, 1925, provides that where a settlement is created by will or arises under an intestacy and, apart from the sub-section, there would be no Settled Land Act trustees of the settlement, the deceased's personal representatives are to be such trustees until others are appointed. If there is only one personal representative, before he is able to act he must appoint (under the provisions of the Trustee Act, 1925) an additional trustee to act with him. The applicant was held to be trustee of the settlement for the purposes of the settlement by virtue of this sub-section.

When settled land is held, after 1925, in trust for persons entitled in undivided shares, the trustees of the settlement, if the land is not already vested in them, may require the estate owner in whom the legal estate is vested to transfer the legal estate in the land to them as joint tenants: Settled Land Act, 1925, s. 36 (1). If the estate owner is a personal representative, this right is subject to his rights and powers for purposes of administration: *ibid.* Bennett, J., found the answer to the question whether the land was still settled land, and therefore within section 36 (1), in the decision of Maugham, J. (as he then was) in *Re Cugny's Will Trusts*, [1931] 1 Ch. 305. In that case, under a settlement contained in a will coming into operation before 1926, the settled property was directed to be held, after the death of the tenant for life, in trust, as to both corpus and income, for the children and issue of the tenant for life in equal shares, the share of any daughter to be held in trust for her for life, with remainder to her children. The tenant for life appointed as her executors the trustees of the settlement and of the will containing it, and in compliance with section 36 (1) of the Settled Land Act they were directed to assent, as executors of the tenant for life, to the vesting of the land in themselves as trustees of the settlement upon the statutory trusts for sale. In *Re Thomas* (*supra*) the learned Judge held that, if the correct interpretation of section 36 (1) is that put upon it by Maugham, J., the applicant had the right to call upon the estate owner to assent to the settled land vesting in him as trustee of the settlement and Bennett, J., made a vesting order appropriate to the case.

M. E. B.

*Charities—gift of land by will—extension of time for sale—land vested in Official Trustee—Mortmain and Charitable Uses Act*, 1891, *ss.* 5, 6.—Land left by will to or for the benefit of any charitable use must generally be sold within one year of the testator's death and if this is not done after the year has elapsed the land vests in the Official Trustee of Charitable Lands and it is then the duty of the Charity Commissioners to see that it is sold: Mortmain and Charitable Uses Act, 1891, ss. 5, 6. The High Court, a Judge thereof in Chambers and the Charity Commissioners are, however, each empowered (*ibid.*, s. 5) to extend the time within which the land must be sold, and Crossman, J., has recently held in *Re Gorham's Charity*, [1939] 1 All E. R. 600, that, on the construction of the two sections, the High Court retains this power notwithstanding the vesting of the land in the Official Trustee under section 6 of the Act of 1891, but it was admitted that there is no power in the Court to divest the land out of the Official Trustee.

It should be added that, notwithstanding the expiration of a year from the testator's death, land within the meaning of the Act of 1891 does not vest in the Official Trustee unless and until the personal representative of the testator assents in writing either to the devise to the charity or to the vesting of the land in the Official Trustee. This effect of the Administration of Estates Act, 1925, was stated in an order of Eve, J., in an unreported case, *Re Bottle* (1929), referred to in a Practice Note in [1939] W. N. 31. In *Re Gorham's Charity* (*supra*) the personal representative had, of course, assented to the devise. It is important to observe that the period of one year referred to in section 5 commences to run at the date of the testator's death, and an assent before the expiration of that year must be in favour of the trustees of the charity, as may an assent after that time, but in the latter case section 6 will at once divest the legal estate and transfer it to the Official Trustee. An assent made one year or more after the death could be to the vesting of the legal estate in the Official Trustee, although this was not the course adopted in *Re Gorham* (*supra*).

M. E. B.

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*Sale of land—error in description—freehold decontrolled properties—small part controlled—recovery of deposit.*—In *Ridley* v. *Oster*, [1939] 1 All E. R. 618, Oliver, J., made some interesting pronouncements when he ordered the return of the deposit paid by a purchaser to a vendor under a contract which described the four properties to be sold as "freehold decontrolled properties",

although in fact two rooms in one of them were still controlled at the date of the contract. The learned Judge assumed that the onus of proving this last fact was upon the plaintiff, who was held to have discharged it, and came to the conclusion that the defendant was not in a position to convey property substantially complying with the description in the contract. " Bearing in mind the many well-known disadvantages from the landlord's point of view in the possession of controlled . . . houses, and the fact that in the present case no rebuilding of the property as a whole could be undertaken without getting rid of the tenants of parts of the middle two of the four houses, . . . what was offered differed in substance and in kind from what was contracted to be conveyed " (p. 622, C. D.). The learned Judge applied what he described as the abstract test of Tindal, C.J., in *Flight* v. *Booth* (1834) 1 Bing. N. C. 370, at p. 377, that a contract of sale is avoided if " the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all ". Oliver, J., said that although the question of decontrol appeared to be a matter of vital importance to the plaintiff, even if it were not, the decision must have been the same because in the test stated above the standard is general, not individual. This necessitates reading the words " the purchaser " in Tindal, C.J.'s *dictum* as " a purchaser ", an interpretation which, it is submitted with respect, does not accord with the authorities: see *Bellotti* v. *Chequers Developments, Ltd.*, [1936] 1 All E. R. 89, where Hilbery, J., after saying that a misdescription involving a difference of four feet was a " material misdescription in the circumstances ", added (at p. 94) that he had to bear in mind that it " might affect one purchaser and not another ".

The learned Judge in the case noted went on to quote the *dictum* of Eve, J., in *Lee* v. *Rayson*, [1917] 1 Ch. 613, at p. 618, to the effect that, although value is an element to be taken into account in determining whether or not the error in description is substantial or material, it is neither the only nor the dominant element. The contract was avoided notwithstanding the absence of evidence of the value of the premises decontrolled as compared with the value if parts were controlled. The pertinent inquiry which has to be answered was indicated by Lord Eldon in *Knatchbull* v. *Grueber* (1817), 3 Mer. 124, at p. 146, where he said that " this Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to

have ". If the statements of the learned Judge in the instant case are correct the Court now applies this doctrine without reference to the materiality of the misdescription to the purchaser in each case.

M. E. B.

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*Mortgage—postponement of right to redeem—perpetuity rule—equitable relief.*—The decision of Luxmoore, J., in *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1938] 2 All E. R. 444 (noted *ante*, p. 84) has been reversed by the Court of Appeal ([1938] 4 All E. R. 618), but not on the points that the particular mortgage was not a debenture and that the rule against perpetuities is inapplicable to the postponement of a mortgagor's right to redeem. The facts were fully stated in the previous note and it is sufficient to say here that a mortgage of freehold properties to secure £310,000 contained certain onerous restrictive clauses and provided that the principal should be repaid by eighty half-yearly instalments, but that the whole of the mortgage money outstanding should become immediately payable on any default in payment. The mortgagors, who had under the mortgage no right to redeem, claimed to be entitled to do so after the expiration of six months' notice upon payment of the principal, interest and costs, their contention being that the postponement of redemption for forty years was void as a clog on the equity of redemption and as infringing the rule against perpetuities.

Sir Wilfrid Greene, M.R., delivering the judgment of the Court, said that the view which the Court took of certain other points raised rendered it unnecessary for them to express any opinion upon the correctness of the rejection by Luxmoore, J., of the argument that the mortgage was a debenture within sections 74 and 380 of the Companies Act, 1929.

The respondents' first argument was that the making of an agreement between a mortgagor and a mortgagee whereby the contractual right to redeem was postponed for a period of forty years was prohibited by a rule of equity and therefore void, as the period was, when judged by the terms of the deed and not by extraneous matters, not "reasonable". The Court found no authority compelling a decision involving such an "unjustified interference with the freedom of business men to enter into agreements best suited to their interests" by imposing upon them "a test of 'reasonableness' laid down by the Courts without reference to the business realities of the case" (at p. 624, G.). Even if the Court had held (as it declined to do) that the period during which

the contractual right of redemption is postponed must be a reasonable one, the respondents had, in the opinion of the Court, failed to discharge the burden of proving that, having regard to the circumstances of the case, the business considerations involved and the terms of the mortgage, there was anything unreasonable in the mere extension of the period for forty years. A postponement of the contractual or legal right of redemption cannot be a clog on the distinct equitable interest called the equity of redemption, and equity relieves against the contractual terms of a mortgage only when the transaction is oppressive or unconscionable or if the contractual right to redeem is illusory. The postponement of the contractual right to redeem in the present case did not render it illusory, nor were there circumstances of oppression.

The Court dissented from the decision of Eve, J., in *Davis* v. *Symons*, [1934] Ch. 442, "in so far as it is based upon the view that the Court is concerned with questions of reasonableness in such a case", and found in the earlier cases usually cited in the same context, circumstances which, when considered with the postponement, justified the granting of the limited equitable relief against the contractual terms of a mortgage. For example, relief was given in *Fairclough* v. *Swan Brewery Co., Ltd.*, [1912] A. C. 565, where the contractual right to redeem a mortgage of leaseholds was postponed until six weeks before the expiration of the lease for twenty years. The provision for redemption was nugatory.

In deciding whether a mortgage transaction is oppressive or unconscionable, the length of time for which the contractual right to redeem is postponed is an important consideration. Moreover, the postponement, by itself unobjectionable, is not made objectionable by the presence in the mortgage deed of other provisions, unless the totality, considered in the light of the business considerations and other circumstances involved in the case, is sufficient to enable the Court to say that the contract is so oppressive or unconscionable that it ought not to be enforced in a Court of equity.

The Court upheld the decision of Luxmoore, J., that the postponement of the contractual right to redeem is not subject to the rule against perpetuities because, according to the learned Master of the Rolls, there did not exist here the mischief of attempted postponement of "the alienation of property for unduly long periods" against which the rule was directed: p. 631 A, B. This statement of the object of the perpetuity rule is a little unusual in its terms and the reference in the judgment (at p. 631 B, C) to section 198 of the Local Government Act, 1933 (not 1923, as stated in the report) can hardly be said to put the matter beyond doubt.

A reference to section 2 of the Agricultural Credits Act, 1932, might also have been made, particularly as its provisions are stated to operate "notwithstanding any rule of equity to the contrary". However, the reasons which were given by Luxmoore, J., for not applying the perpetuity rule are, it is submitted, conclusive. Leave to appeal to the House of Lords was granted, so the case may have to receive further consideration at a later date.

M. E. B.

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## 2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

*Rent Restrictions Acts—what dwelling-houses can now be subject to the Acts.*—Under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, a dwelling-house is not controlled by the Acts "unless it is a dwelling-house to which they applied immediately before the passing of this Act or then formed part of such a dwelling-house", and it is also a dwelling-house falling within the new limits of rateable value specified in the 1938 Act. A dwelling-house was not one to which the Acts applied immediately before the passing of the Act of 1938, unless it was a dwelling-house to which the Acts applied *immediately before July* 18, 1933, or then formed part of such a dwelling-house (1933 Act, s. 1 (2)). This is subject to the provisions as to registration, by virtue of which failure to register a dwelling-house as decontrolled may in certain circumstances bring back into control a dwelling-house which had once been controlled and had been decontrolled under section 2 of the Act of 1923.

It necessarily follows from the above provisions that a dwelling-house now existing cannot be subject to the Rent Acts unless it was a *dwelling-house* immediately before July 18, 1933. "Dwelling-house" is defined by section 16 (1) of the Act of 1933 as meaning, unless the context otherwise requires, "a house let as a separate dwelling or a part of a house being a part so let". There is nothing in the context of the provisions now under consideration to require a different meaning, and so a dwelling-house now alleged to be a subject of control must have been, or formed part of, immediately prior to July 18, 1933, a house *let as a separate dwelling* or a part of a house being a part so let.

In *R. & P. Properties, Ltd.* v. *Baldwin*, [1938] 4 All E. R. 345, two flats had been let as two separate controlled dwelling-houses before the passing of the 1933 Act, and were so let

immediately prior to July 18, 1933. They had subsequently, by works of reconstruction of a minor nature, been converted into one flat and at the time of action brought the premises were let as one dwelling-house of which possession was sought. Clearly this dwelling-house was not *let as a separate dwelling* immediately before July 18, 1933, the premises having then been let as two individual dwellings. The premises the subject of the present action were therefore not a dwelling-house within the meaning of the Acts at the relevant date in 1933, and so were held by the Court of Appeal not to be the subject of control.

It is thought that, from the point of view of the principle involved, this is the most important of recent decisions on the Rent Restrictions Acts.

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*Rent Restrictions Acts—registration of decontrol—sub-division of "Class B" dwelling-house after decontrol under Act of* 1923.—If it is claimed that a "Class C" dwelling-house had become decontrolled (for example, on the ground of actual possession) before the passing of the Act of 1933, it should as a general rule have been registered under that Act as decontrolled and if not so registered will be deemed to be controlled.

For the detailed application of this rule it is, however, important to consider the exact provisions of section 2 (2) of the Act of 1933. It is there provided that if the landlord of any "Class C" dwelling-house let as a separate dwelling immediately before the passing of that Act claims that by virtue of the provisions of section 2 of the Act of 1923 the principal Acts had ceased to apply to *the dwelling-house* before the passing of the Act of 1933, he must make application for registration in the prescribed manner.

In *Fox* v. *Marshall* (1938), 55 T. L. R. 283, a "Class B" dwelling-house was in 1928 decontrolled by the landlord obtaining actual possession within the meaning of section 2 of the Act of 1923. The house was then divided into two parts and let to separate tenants, the rateable value of each portion being such as to constitute that portion a "Class C" dwelling-house. When the 1933 Act was passed the landlord did not register these "Class C" dwellings as decontrolled, and the question now arose whether under the Act of 1933, s. 2, the upper portion of the house was controlled or decontrolled.

It was held by the Court of Appeal that the dwelling-house the subject-matter of section 2 of the Act of 1933 is the same entity as that which was the subject-matter of section 2 of the

Act of 1923. That dwelling-house being a "Class B" house, it was not brought back into control by failure to register under section 2 of the Act of 1933. So notwithstanding the division and occupation of the house as two "Class C" dwelling-houses now, these dwelling-houses enjoyed the decontrol effected when they were a "Class B" house and did not need to be registered under the Act of 1933. A further point which did not, it seems, arise in *Fox* v. *Marshall* is worthy of mention: it seems that in such a case there is no need either to register under the Act of 1938. Generally speaking, a "Lower Class B" dwelling-house under the Act of 1938, which had been decontrolled before May 26, 1938, under section 2 of the Act of 1923, requires now to be registered. But the registration section of the 1938 Act (s. 4) only calls for registration of a decontrolled "Lower Class B" dwelling-house which was *let as a separate dwelling immediately before May* 26, 1938. Where the "Class B" dwelling has been divided as in the case of *Fox* v. *Marshall*, it has ceased to be let as a *separate* dwelling at the relevant date, and so would not appear to fall within the registration provisions.

A point in connection with *Fox* v. *Marshall* which requires noting is that the case speaks of section 2 (1) of the Act of 1933 as not operating to bring back this dwelling-house under the Rent Acts. It seems that that particular sub-section never operated actually to *bring back* any dwelling-house under the Rent Acts (it has now been repealed and replaced by section 3 of the 1938 Act): see *Brooks* v. *Brimecome*, [1937] 2 K. B. 675; its operation was purely prospective and not retrospective. It is sub-section 2 of section 2 of the Act of 1933 which may operate to *bring back* a dwelling-house into control, by reason of failure to register.

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*Rent Restrictions Acts—inclusive letting of a dwelling-house part of which has been decontrolled and part of which remains controlled.*—In *Worthy* v. *Lloyd*, [1939] 1 All E. R. 474, part of a controlled house was sublet. Upon the death of the mesne tenant in 1932, the landlord recovered actual possession of the part which was not sublet, and so that part became decontrolled under section 2 of the Rent and Mortgage Interest (Restrictions) Act, 1923. The landlord then let the entire house at an inclusive rent to the person who had hitherto been subtenant and had remained in possession of a controlled portion of the dwelling-house all the time. It was held by the Court of Appeal that this was a controlled letting and that no more than the controlled rent

could be recovered for the entire house. The principle is that where there is one letting of two suites of rooms at an entire rent, which issues out of every part of the premises, that letting must be viewed as a whole for the purpose of determining the application of the Rent Acts (see *Rider* v. *Rollit* (1920), 36 T. L. R. 687; *Langley* v. *Wood*, [1926] E. G. D. 203). "In my view", says Scott, L.J., "there is no choice, in regard to a whole house under one tenancy, between its being subject to the Act as a whole house and being not subject to the Act at all."

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*Agricultural Holdings Act*, 1923—*provision entitling landlord to resume possession of any portion of demised premises without paying compensation.*—By section 27 of the Agricultural Holdings Act, 1923, where the landlord of a holding gives notice, in pursuance of a provision in that behalf contained in the contract of tenancy, of his intention to resume possession of some part of the holding, the provisions of the Act respecting compensation apply as if the part to which the notice relates were a separate holding. Under section 12, (7) (b), compensation is not payable unless the tenant has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under section 12 of the Act. By section 50 it is provided that, subject to the provisions of the Act, any contract made by a tenant of a holding, by virtue of which his right to claim compensation under the Act is taken away or limited, is to that extent void.

In *Re Disraeli's Agreement, Cleasby* v. *Park Estates (Hughenden), Ltd.* (1938), 55 T. L. R. 204, a tenancy agreement for two years and thereafter terminable by two years' notice to quit expiring on September 29 in any year, contained a provision entitling the landlord to resume possession in case required for building or otherwise of any portion of the demised premises without payment of compensation to the tenant but with proportionate reduction in rent. This clause was construed by Crossman, J., as meaning that if the landlord required any part of the demised premises for building or for any purpose *ejusdem generis* with building, he could determine the tenancy as to such part without giving any notice to the tenant and without paying any compensation. Clearly, if compensation would have been payable under the Act apart from this clause, the clause is rendered void by section 50.

The assignee of the reversion in respect of part of the demised

premises gave notice to the tenant of resumption of possession under the above clause, and Crossman, J., held that the effect of section 27 was that compensation became payable under section 12; but that the landlord's notice of resumption of possession terminated the tenancy as to that part of the demised premises affected thereby, and, since it operated in this respect immediately, the tenant was deprived of his right, by virtue of the requirement of section 12 (7) (b), of claiming compensation under the Act. The clause in question was therefore one by which the tenant's right to claim compensation under the Act was "taken away or limited", within the meaning of section 50, and was therefore void.

The case is an interesting one, and invites consideration of the question whether such a clause is not void in any event upon the simple short ground that it purports to give the landlord a mode of terminating the tenancy without payment of compensation, and is therefore under section 50 a contract by virtue of which the tenant's right to claim compensation under the Act is taken away or limited. Clauses for resumption of possession of part of a holding must be so drafted as not to take away or in any way limit the tenant's right to claim compensation under the Act.

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## 3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

*Administration—ademption—presumption against double portions—rebuttal by nature of testamentary portion—discretionary trust.*—The facts of *Re Vaux, Nicholson* v. *Vaux* (*No.* 2), [1938] 4 All E. R. 703 (C. A.), were approximately as follows. In 1919 the testator made a will whereby he settled a legacy of £20,000, out of his residue, upon each of his two daughters. Subject thereto, he bequeathed the residue to trustees upon a discretionary trust for his children, indicating, by mere precatory words, that he hoped the discretion would be exercised primarily for the benefit of his two sons. In 1924, five years later, the testator executed a voluntary *inter vivos* settlement of certain shares in a company of the nominal value of £40,000, to be divided into four equal parts of which one such part was settled upon each of his four children. He died in 1925. The question now raised is whether, by the rule against double portions, the *inter vivos* settlement operated to adeem *pro tanto* the daughters' benefits under his will.

Simonds, J. (*ante*, Vol. II, p. 384B), held that there was nothing

here to oust the presumption against double portions. He further held that the ultimate discretionary trust of the residue, under the will, was avoided by the perpetuity rule; that in so far as the settled legacies were adeemed, the property therefore devolved as on intestacy; and, consequently, that the rights on intestacy should be adjusted in order to insure that only the testator's children (not his widow) would benefit from the ademption. The Court Appeal, however, subsequently held (*ante*, p. 225) that the ultimate discretionary trust of the residue was valid; and now, adverting to the rule against double portions, has held further that the rule against double portions is inapplicable to the facts of this case. The Court of Appeal, therefore, found it unnecessary to consider whether the intestacy rules should be adjusted when the presumption against double portions operates to adeem a legacy in favour of those entitled on intestacy.

The Court of Appeal assumed, for the purposes of this decision, that the benefits conferred upon the daughters by the will and settlement respectively were "portions"—though some doubts were expressed as to whether those in the settlement were truly portions (for each child received thereunder an equal benefit, and there was a cross-gift over to the others on the death of a child without issue). The reasoning of Greene, M.R., with whose judgment the other members of the Court agreed, was as follows: In substance, the will gave to trustees a special power of appointment among the testator's four children, with a provision that the minimum share of each daughter should be £20,000. There is no authority that the presumption against double portions is applicable to adeem a testamentary special power of appointment. Moreover, where (as in the present case) the will does not make a *definite* provision for a child, but leaves to trustees or an appointor the decision as to how much the child shall have, the circumstances and nature of the gift are inconsistent with any presumption which might otherwise arise, should the testator subsequently give the child a portion *inter vivos*, that the *inter vivos* portion was intended to adeem any benefits which the child may derive from the will. Accordingly, having regard to the circumstances (*viz.*, the provisions of his subsisting will) which existed when the testator made the *inter vivos* settlement, the intention to be ascribed to him at that time was inconsistent with, and operated to rebut, the normal presumption against double portions.

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*Administration—annuities and pecuniary legacies—direction to set aside a fund—gift over of fund after cesser of annuity—*

*deficiency of assets—construction.*—When a testator's assets are not sufficient both to pay pecuniary legacies in full and to provide from income any annuities bequeathed by his will, recent decisions (*ante*, pp. 98—99) show that one should ordinarily take the annuities at their actuarial value and pay outright to each annuitant the sum so ascertained—abated rateably, if need be, with the pecuniary legacies. When, however, the will directs that a fund be set aside sufficient to provide the annuity from income and further directs that this fund be paid, on the death of the annuitant, to X, the above procedure is more difficult to justify; for, if no fund is to be set aside, there would appear to be nothing for X. For this reason, in *Re Nicholson*, [1938] 3 All E. R. 270 (*ante*, pp. 99—100), Crossman, J., decided, on the construction of the will before him, that in such a case the fund directed to be set aside (not the actuarial value of the annuity) should be taken—abating rateably with pecuniary legacies. Thereupon, the rights of X are to some extent preserved. Since the will there conferred upon the annuitant the usual right to resort to the capital of the fund if its income should prove inadequate to produce the full annuity, and since this right was likely to be freely used by the annuitant (for it was obvious that an abated fund could not supply the full annuity solely from income), it was clear that this arrangement would favour the annuitant and would reduce or even exhaust the fund to which X would ultimately be entitled. But this was not unreasonable; for the annuitant's express power to resort to capital showed that his rights against the fund were intended by the testator to have priority.

Now, in *Re Farmer, Nightingale* v. *Whybrow*, [1939] 1 All E. R. 319, what appears to be a virtually identical case has been decided by Farwell, J., in a different fashion. He decided that the direction to set aside a fund should be ignored, and, instead, that the annuity should be taken at its actuarial value and, after abating rateably with pecuniary legacies (if necessary), paid outright to the annuitant. He denied that, by thus following the ordinary procedure, he was destroying the ultimate gift to X. It is not easy to see, from the report, precisely what X gets under this arrangement in lieu of his legacy of a reversionary interest in the fund. But the concluding words of the judgment indicate that he gets nothing, unless there is a surplus after both the pecuniary legacies and the actuarial value of the annuity have been paid *in full*—in which case it seems that he gets the surplus (apparently at once). Although the apparent intention of such a will admittedly justifies a decision which insures that, as between the annuitant and X, the annuitant's rights are paramount, it will be noted that under

the scheme here adopted the pecuniary legatees also become paramount to X; and this, perhaps, is less easy to justify. *Re Nicholson* (*supra*) was distinguished on the grounds that these cases turn upon the construction of the particular will and that decided authorities are of little assistance. On this ruling, it would seem that the proper mode of procedure in a case of this kind cannot be known without an application to the Court.

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*Administration—annuity and pecuniary legacies—income of residue insufficient to meet annuity—payment of actuarial value to annuitant—adjustment of annuitant's rights on partial intestacy.* —The principle of *Re Cottrell*, [1910] 1 Ch. 402, whereby the actuarial value of annuities given by will may be paid to the annuitants, if the testator's assets are unable both to pay any pecuniary legacies in full and to produce an income sufficient to meet the annuities, has been considered in several recent cases (*ante*, pp. 98—100). The latest decision on the matter is *Re Vardon, Brown* v. *Vardon*, [1938] 4 All E. R. 306. Besides specific gifts and certain pecuniary legacies (value £200), the testator had bequeathed to his widow an annuity of £400 during her life: there was no valid residuary gift. After due provision for debts and specific gifts, some £9,000 remained—too small a sum to provide both the pecuniary legacies and an adequate fund from the income of which the annuity might be paid. Farwell, J., applying the principle of *Re Cottrell*, accordingly held that the executors should pay the pecuniary legacies in full (they had already done so) and pay outright to the widow the capitalised actuarial value of her annuity. In view of the absence of a residuary gift, the question then arose as to whether the widow was further entitled to claim from the remaining residue (some £4,000) the statutory benefits which ordinarily accrue to a widow on a partial intestacy—*viz.*, (1) £1,000 with interest at 5 per cent. till payment, and (2) a life interest in the income of the remainder. As to (1), the parties had already agreed that this be paid to her at once. As to (2), the learned Judge declared that she must forgo her statutory life interest in the income, and that the income must instead be applied during her life towards recouping to the remaining residue the capital sum already paid to her as the actuarial value of her annuity. It would seem that this expedient was a just one; for there would have been no surplus income for her (nor, indeed, her full annuity) had the normal procedure been followed whereby

annuitants are paid only out of income—see *Re McKee*, [1931] 2 Ch. 145.

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*Administration—costs of inquiries—R. S. C., Ord. 65, r. 14B—direction to pay testamentary expenses.*—By virtue of Order 65, rule 14B, "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct". In *Re Phillips, Public Trustee v. Phillips*, [1938] 4 All E. R. 483 (C. A.), the testator gave his residuary estate to trustees on trust to convert and out of the proceeds "to pay my funeral and testamentary expenses and all death duties and other moneys which are payable out of my estate", and to hold the residue thereof as to one-third for A absolutely and as to the remaining two-thirds for the nephews and nieces of the testator living at his death. There was difficulty in ascertaining the identity and whereabouts of the nephews and nieces in question: an inquiry was therefore held, and the Judge ordered that the costs thereof be borne by the share of the nephews and nieces. On appeal, this order was confirmed. Order 65, rule 14B, means that the costs shall fall upon the legacy or share concerned unless there are circumstances which, in the discretion of the Judge, justify a direction to the contrary. In exercising that discretion, he should consider all the relevant circumstances, including any indications (such as appeared in the present will) that the testator desired testamentary expenses to be paid out of the residue as a whole. But the Court of Appeal refused to lay down strict rules which might fetter the Judge's discretion, and pointed out that, in the present case, the sole cause for an inquiry was the difficulty of identifying those entitled to the two-thirds share: there was no difficulty in construing the words of the will or in identifying the person entitled to the other share of the residue. (The case was in fact concerned with one of the Rules of the Palatine Court; but that Rule is identical with R. S. C., Ord. 65, r. 14B.)

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*Administration—executor's liability on covenants of lease—indemnity fund paid into Court—payment out.*—In 1891 an order was made, in an action for the administration of the estate of Mrs. Lewis (deceased), for the payment into Court of a fund out of which to indemnify her executor against any liability on the repairing covenants of certain long leases which she had specifically

bequeathed by her will. At the date of the order all her debts and legacies had been paid in full, and (*semble*) the leases had been transferred to the appropriate legatee. A few weeks ago, in *Re Lewis, Jennings* v. *Hemley*, [1939] 1 Ch. 232, Simonds, J., was asked that the sum paid into Court might now be paid out to her residuary legatees. Although the repairing leases had not yet expired, the learned Judge granted this application. It is well established that funds so paid into Court are paid in purely for the protection of the executor and that the lessor (as a possible future creditor) has no right to claim that such a fund be created or retained. If, therefore, the executor no longer needs such protection, the fund may be paid out. The earlier decisions indicate that payment into Court was unnecessary if the executor, having made full disclosure to the Court, distributed the assets under the Court's direction; for the Court's decree is in itself a complete indemnity to him (see *Re Nixon*, [1904] 1 Ch. 638). But where the executor had taken possession, it was thought that his liability (by privity of estate) would justify the retention of a fund. In the present case, Simonds, J., appeared to doubt the latter proposition; but he held that, in any event, the executor was here completely protected by the Statute of Limitations. It should be noted that the Trustee Act, 1925, s. 26 (1), now gives statutory protection to a personal representative liable "as such" on the covenants of a lease, and does not require a fund to be set aside (except to meet any fixed sums agreed to be laid out on the land), provided that he has satisfied existing liabilities and has assigned the lease to a purchaser or to the appropriate legatee. But before 1926 there was no statutory protection where, as in the present case, he assigned to a legatee. And even to-day it may be that section 26 (1) does not completely protect an executor if he has been in possession; for it appears to apply only to the liability of an executor "as such".

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*Administration—executor's right of retainer—costs of administration action.*—A short point as to the executor's right of retainer arose in *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1939] 1 All E. R. 382. A creditor of the deceased commenced an action by originating summons against the deceased's executrix. The estate was admittedly insolvent, and the usual order for administration was made. Subsequently, the executrix filed affidavits to the effect that she was herself a creditor for a substantial sum and claimed to retain the assets towards the satisfaction of her debt.

The question then arose whether she could so retain as against the plaintiff's costs in the administration action. Crossman, J., held that recent legislation has not deprived executors of their right to do so. The Court's discretion, under section 50 (1) of the Judicature Act, 1925, "to determine by whom and to what extent" the costs of such an action are to be paid, is a discretion which equally existed when such cases as *Chissum* v. *Dewes* (1828), 5 Russ. 29, established their right to retain against such a claim for costs. Nor does sub-section 2 of section 34 of the Administration of Estates Act, 1925, affect the question; for, as was said by Lord Tomlin, in *Att.-Gen.* v. *Jackson*, [1932] A. C. 365, 384, the words "*subject as aforesaid*, nothing in this Act affects the right of retainer" merely preserve the restriction (to debts owed to the testator in his own right) imposed by the earlier words of that same subsection: they do not operate to oust the right of retainer from cases to which sub-section 1 applies (*i.e.*, cases in which the estate is insolvent).

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*Probate — omission of words from grant — clerical error — "charitable or benevolent objects".*—The jurisdiction of a Court of probate to order that certain words or phrases of a will be omitted from the grant of probate is very limited in its application. Such an order may be made—*e.g.*, where the words were inserted by clerical error—if the words are self-contained. But the Court will not add words to a will, even in place of words thus rejected; for it refuses to make a new will for the testator. And, on similar reasoning, it will not order even the omission of a word or phrase, if that omission would alter the sense of what remains. Such was the decision of the Court of Appeal in *Re Horrocks, Taylor* v. *Kershaw*, [1939] 1 All E. R. 579. There the testatrix had bequeathed her residuary estate to trustees for such "charitable or benevolent object or objects" as her trustees should select; but evidence was adduced that, when drafting the will twelve years ago, the words which her solicitor had in fact dictated to his typist were "charitable *and* benevolent". The Court was therefore invited, on the ground of clerical error, to omit from probate the word "or". In the Court below, Sir Boyd Merriman, P., granted this application. The Court of Appeal, however, overruled his decision and gave two independent reasons for doing so: first, that the Court does not interfere with a will unless the evidence is clear and convincing; second, that to omit the word "or" would alter the sense of what remains. A trust for "charitable benevolent" objects would comprise only such objects as are both charitable and benevolent.

The omission of " or " would thus exclude both benevolent non-charitable objects and charitable non-benevolent objects—*i.e.*, it would restrict the compass both of the word " benevolent " and of the word " charitable " as employed in the will.

Although evidence was given to show that the testatrix did not read the will before she signed it, the Court held that this, in itself, was no objection : whether a testator himself approves the words of his will (as is the presumption), or whether he confides to a draftsman the task of selecting them, words so approved or selected must stand. Moreover, the argument that the existing words of the will would lead to an intestacy—for a gift to " charitable *or* benevolent " objects commonly fails for uncertainty—is irrelevant in a Court of probate. The Court " is concerned with the words which the testatrix intended to use, not with the question whether or not those words will produce an effective result in law ". It will be remembered that a Court of *construction*, faced with a will the words of which admit of two constructions, is said to prefer that which will render it valid (see *Re Hooper*, *Hooper* v. *Carpenter*, [1936] Ch. 442, 446); but this, of course, is a different type of problem.

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*Will—condition—public policy—forfeiture on undertaking any " public office ".*—In *Re Edgar*, *Cohen* v. *Edgar*, [1939] 1 All E. R. 635, the testator's will stipulated that, if either of his sons should " prior to the year 1943 become candidates for or enter Parliament or undertake any other public office ", such son would lose all benefits under the will not then already received by him. On an originating summons to determine, *inter alia*, whether this condition was void as against public policy or for uncertainty, Bennett, J., held that it was void as being contrary to public policy. A " public office " within the condition would probably include a commission in the Territorial Army (which the sons now desired to obtain); and *Re Beard*, [1908] 1 Ch. 383, decided that a condition against entering the naval or military services of the country is void as against public policy. The condition was against public policy also, *semble*, on the wider ground that it might interfere with acts that are regarded as being in the interest of the State. Moreover, although the learned Judge did not expressly so decide, he thought there were good grounds for suggesting that the condition here was void also for uncertainty.

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## 4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

*Income tax—Schedule D—Trading by executor.*—The decision in *Newbarns Syndicate* v. *Hay*, Tax Leaflet 966; 17 A. T. C. 308 (see *The Conveyancer*, December 1938, at page 227) has now been affirmed by the Court of Appeal (Tax Leaflet 1006).

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*Tax free annuities—immunity from surtax.*—The decision in *Re Horlick's Trusts*, [1938] 2 All E. R. 553 (see *The Conveyancer*, June 1938, at pages 384D-F) has now been affirmed by the Court of Appeal, [1938] 4 All E. R. 602.

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*Transfer of assets — Finance Act, 1936, s. 18 — executor's liability.*—Two distinct points arising out of the transfer of assets provisions of the Finance Act, 1936, were decided in *Cottingham's Executors* v. *C. I. R.*, [1938] 2 K. B. 689. The first question to be considered was whether the case was within the proviso to subsection 1 of section 18, which, as it stood before the amendments made by the Finance Act, 1938, excluded the application of section 18 where it was shown that the transfer and associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation. The answer to that question turned on the construction of the proviso. On behalf of the taxpayer it was contended that what had to be decided by the Special Commissioners was whether the whole group of transactions consisting of the transfer and any associated operations, taken together, had as its main purpose some purpose other than the avoidance of taxation. The Crown's contention was that what the taxpayer must show was that some purpose other than the avoidance of taxation was the main purpose both of the transfer and also of any associated operations. On this point Lawrence, J., decided in favour of the Crown. So far as it relates to the language of the original proviso to section 18 (1), the decision is not of

great practical importance by reason of the substitution of a differently worded proviso by section 23 (2) of the Finance Act, 1938. Save for the purpose of assessments to standard rate tax (as distinct from surtax) for 1937-38, the substituted proviso takes effect for the purpose of assessment to tax for 1937-38 and subsequent years. It places a heavier burden upon the taxpayer than did the original proviso, since it requires him to show either (a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected, or (b) that the transfer and any associated operations were *bona fide* commercial transactions and were not designed for the purpose of avoiding liability to taxation.

The second point raised in *Cottingham's Case*, above, was with regard to the liability of personal representatives of a deceased taxpayer to be assessed under section 18 of the 1936 Act. That the ordinary liability of personal representatives to assessment under rule 18 of the All Schedules Rules exists in relation to tax chargeable under section 18 of the 1936 Act is clear from paragraph 4 of the Second Schedule to that Act, which makes applicable all the provisions of the Income Tax Act relating to the charge, assessment, collection and recovery of tax. It was held in *Cottingham's Case* that rule 18 was none the less applicable because the taxpayer had died before the date—July 16, 1936—when the 1936 Act became law. Owing to the retrospective operation of the Act, it turned out after the taxpayer's death that profits accruing to him from April 6, 1935, to the date of his death were taxable under section 18, and it could not be denied that he had in fact died "without having delivered a statement of all his profits or gains chargeable to tax".

[The decision in *Cottingham's Executors* v. *C. I. R.* has been affirmed on appeal.]

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*Additional assessments—discovery.*—Certain observations of the Court of Appeal in *British Sugar Manufacturers* v. *Harris*, [1938] 2 K. B. 220, may be interpreted as casting doubt upon the wide construction placed in *Williams* v. *Grundy's Trustees*, 18 T. C. 271, on the meaning of "discovery" in section 125 of the Income Tax Act, 1918. But in the *British Sugar Manufacturers' Case* the Court of Appeal did not have occasion to decide the limits of "discovery", and a decision on the same lines as that in *Williams* v. *Grundy's Trustees*, above, has been given by the Court of Session in *C. I. R.* v. *MacKinlay's Trustees*, Tax Leaflet 982. X, who was a partner

in a certain firm, died in the tax year 1934-35. The partnership deed provided that on his death there should be paid to his estate, in lieu of his share of profits for the year in which he died, a certain sum to be computed by reference to the profits of the firm for the preceding three years. The precise terms of these provisions are unimportant for the present purpose. It is enough to say that all the material facts were fully communicated at the proper time to the Revenue authorities, who in November, 1935, stated in writing to the solicitors dealing with X's estate that, in the opinion of the Assessing Commissioners, X was not entitled to any share of the firm's profits for 1934-35, and that the sum which under the partnership agreement became payable to his estate on his death did not, as to any part of it, form part of his total income for that year. No further communication was received from the Revenue authorities until in December, 1937, after an interval of more than two years, the solicitors were informed that it was proposed to raise an additional assessment to surtax on the footing that a sum representing X's share of the partnership profits for 1934-35 fell to be included in his total income for that year. The question before the Court was not whether the view of the law now taken by the Commissioners was correct, but whether, even if it was, an additional assessment was competent on the basis of a "discovery". It was decided that there had been a "discovery" within the meaning of section 125, since there is (it was held) sufficient compliance with the wide language of that section if it is discovered that there has in fact been an under-assessment; even though all the facts have from the outset been in the possession of the Revenue authorities and there is no question of any new fact being brought to light, section 125 will, nevertheless, warrant an additional assessment where there was an under-assessment due to an error in law.

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*Settlements for benefit of children—irrevocability—Finance Act*, 1936, *s.* 21.—Section 21 of the Finance Act, 1936, which deals with the attribution to a settlor, in certain cases, of income settled on children, provides in sub-section 10 that the section shall apply to every settlement except a settlement made before April 22, 1936, "which immediately before that date was irrevocable". Sub-section 8 provides that, for the purposes of section 21, a settlement shall not be deemed to be irrevocable if (*inter alia*) "the terms thereof provide . . . for the determination of the settlement by the act or on the default of any person". The first reported decision on the meaning of the word "irrevocable" in sub-

section 10 is to be found in the Scottish case of *C. I. R.* v. *Warden* (1938), Tax Leaflet 986. The trust deed in this case was made before April 22, 1936. It provided for the payment of monthly sums by the settlor for the benefit of his daughters, one of whom was an unmarried infant. It was expressed to be irrevocable at the instance of the settlor, but power to cancel the settlor's obligations under the deed was vested in the trustees. It was unanimously held by the Court of Session that, quite apart from any question which might arise on the meaning placed upon the expression "irrevocable" by sub-section 8, the deed was in any case not irrevocable in the ordinary legal sense of that term. The Lord President expressed the view, which was evidently shared by the two other members of the Court, that "a deed is revocable if it is terminable either by the truster or by persons appointed by the truster with power to terminate". So far, at all events, as the law of Scotland is concerned, it has thus been made clear that, even supposing that sub-section 8 is not applicable to the word "irrevocable" in sub-section 10, a deed of this type can still not be regarded as irrevocable. Lord Moncrieff and Lord Carmont disposed of the question at issue without reference to sub-section 8. The Lord President, however, though he shared the view that there was no necessity to invoke sub-section 8 in order to decide the appeal against the settlor, made the important observation that it was not the case that the sole test was whether the settlement was irrevocable according to the law as it stood at April 22, 1936, the implication being that the artificial meaning placed upon the word "irrevocable" in sub-section 8 may be read into sub-section 10. Though the case was not decided on this point, the position is, nevertheless, that there is now authoritative support for the view that sub-section 10 must be construed by reference to sub-section 8.

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*Annual payments—income payments or instalments of capital.*—The decision of the Court of Appeal in *C. I. R.* v. *Mallaby-Deeley* (1938), Tax Leaflet 1002, provides an important illustration of the principle that, where an individual covenants to make a series of annual payments, those payments will not be deductible in the computation of his total income if, when the transaction is fully understood, its real nature turns out to be the payment of a capital sum by instalments. In *Mallaby-Deeley's Case* the salient facts, omitting details which are for the present purpose immaterial, were as follows. X had bound himself to pay a certain

sum by instalments to Y. After part of the sum had been paid off, X entered into a deed by which he covenanted to make a series of annual payments to Y, the aggregate amount of the payments being calculated by reference to the outstanding balance of the capital sum. The deed contained on the face of it no reference to X's pre-existing obligation. It was, however, found as a fact in the Case Stated that the deed was handed over to Y in exchange for the document containing X's original undertaking for the payment of instalments. Further, there was annexed to the Case Stated a letter from X's solicitor to Y, in which it was stated that "following upon our interview of yesterday, I send you a copy of the new deed to be exchanged for the old one". In delivering a judgment in which the other members of the Court concurred, the Master of the Rolls decisively rejected the view that the deed containing the covenant for annual payments should be considered by reference solely to its terms and in isolation from anything outside it. The deed was only part of a transaction which, regarded as a whole, included the original undertaking and the exchange which had in fact taken place of the new document for the old. The true position was, therefore, that, there having been a pre-existing obligation to pay a capital sum by instalments, the effect of the new deed was merely to carry out the original arrangement, with the substitution of different amounts and different dates of payment—changes which did not alter the real nature of the transaction so as to enable the payments to be regarded as revenue payments and not instalments of a capital sum. The Master of the Rolls made it clear that a mere *intention* to provide some particular aggregate sum by means of a series of annual payments would not of itself cause the annual payments to assume the character of instalments of capital. If, for example, A—having no pre-existing obligation to B—decides that he will place B in possession of (say) £700 and covenants to pay B £100 a year for seven years, the fact that A had in mind an aggregate amount of £700 will in no way affect the deductibility of the annual payments in the computation of A's total income. On this point, the Master of the Rolls was emphatic in rejecting a suggestion advanced by the Crown. The distinction is between a case like that just supposed and one in which the capital sum can be said to have a real existence. It will be seen that *Mallaby-Deeley's Case* is an important addition to the line of decisions of which recent examples are *C. I. R.* v. *Ramsay*, 20 T. C. 79, and *Dott* v. *Brown*, 15 A. T. C. 157.

## 5. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

*Estate duty—allowance for funeral expenses and debts.*—The decision in *Re Barnes*, [1938] 2 K. B. 684 (see *The Conveyancer*, December, 1938, at p. 229) has now been affirmed by the Court of Appeal : see [1939] 1 K. B. 316.

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*Succession duty—effect of variation of settlement by private Act of Parliament.*—By a decision reported in [1939] 1 All E. R. 236, the Court of Appeal has reversed Lawrence, J.'s decision in favour of the Crown in *Att.-Gen.* v. *Glyn Mills & Co.*, [1938] 3 All E. R. 605 (see *The Conveyancer*, December, 1938, at p. 229). The somewhat complicated facts of this case have already been summarised in *The Conveyancer* (*l.c.*) and need not here be repeated. The question at issue, stated in its simplest form, was as follows : By virtue of a certain settlement, X had a life interest in certain property, subject to forfeiture on alienation, and Y had power to charge the property with a certain sum, but so that any sum so charged should not become payable till after the death of X and should not become payable at all unless Y survived X. Y did not in fact survive X. Before Y's death, however, there had been passed a private Act of Parliament which (1) enabled Y to exercise his power of charging so as to cause the charge to take effect on the death of X, whether Y survived him or not, and (2) enabled X, notwithstanding the forfeiture clause in the settlement, to release his life interest in the sum so charged without forfeiting his life interest in the settled property as a whole. Y proceeded to exercise his powers of charging under the provisions of the Act, and X released his life interest in the sum so charged, with the result that that sum was in fact raised by the trustees and placed at Y's disposal. At X's death, succession duty was claimed on the footing that what had occurred had been an acceleration of Y's title to his succession within the meaning of section 15 of the Succession Duty Act, 1853. Reversing the judgment of Lawrence, J., the Court of Appeal rejected this contention and decided that the sum to which the private Act had enabled Y to obtain an indefeasible title could not be said to be a succession taken by him under the disposition contained in the settlement. In other words, the power by virtue of which Y had in fact become entitled to the sum in question was not the

same power as that conferred upon him by the settlement, and what had happened as a result of the enactment of the private Act was not the acceleration of the title to a succession created by the settlement but the creation of a new interest arising from a different source.

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*Estate duty—accumulations.*—Farwell, J.'s decision in *Re Hodson's Settlement; Brookes* v. *Att.-Gen.*, [1938] Ch. 916 (see *The Conveyancer*, December, 1938, at pp. 228-9) has now been reversed by the Court of Appeal. In delivering the judgment of the Court, Clauson, L.J., reviewed the whole line of cases beginning with *Adamson* v. *Att.-Gen.*, [1933] A. C. 257, and *Hodson's Case* calls, therefore, for further notice.

In deciding that the accumulations of income of the settled property were not aggregable for the purposes of estate duty on the settlor's death, Farwell, J., proceeded on the footing that what had happened on the death was not a passing of the property under section 1 of the Finance Act, 1894, but a notional passing under section 2 (1) (d), and the distinction was essential to his reasoning. That the relevant provisions were those of section 2 (1) (d) and not those of section 1 was the conclusion which, in the opinion of the learned Judge, he was obliged to draw from the views expressed by the Court of Appeal in *Att.-Gen.* v. *Lloyds Bank*, 14 A. T. C. 555. In that case the House of Lords ([1935] A. C. 382), while affirming the decision of the Court of Appeal, took a different view of the construction of the settlement, so that the question considered by the Court of Appeal turned out to be a question which did not require to be decided. Nevertheless, Farwell, J., was of opinion that, in the light of what had been said in the Court of Appeal in the *Lloyds Bank Case*, he was bound to hold that *Hodson's Case* fell within section 2 (1) (d) and not within section 1.

In order that the decision to the contrary now arrived at by the Court of Appeal may be understood, it is necessary to state briefly the provisions of the settlement in question. The settled property was directed to be held on trust (a) to pay out of the income £1,200 a year to S for life; (b) during the joint lives of S and the settlor to accumulate surplus income; (c) after the death of the settlor, if S survived him, to pay the income of the accumulations to S for life; (d) after the death of S to hold the trust property (including the accumulations) in trust for the children of S as provided in the settlement. It has now been made clear by the

Court of Appeal that, notwithstanding anything which may have been said by that Court in the *Lloyds Bank Case*, it must be taken to be established that the question on which attention must be concentrated in deciding whether there is a true passing or a notional passing is whether the death effected an alteration in rights, as distinct from merely removing the possibility of an alteration. If *all* that happens on the death is that a previously defeasible interest becomes indefeasible, then there will not be a true passing under section 1, and the only provisions which can be applicable will be those of section 2 (1) (d). In *Hodson's Case*, however, this was not all that happened on the death of the settlor. What happened on his death was that the trust for accumulation ceased, and S, who had previously had an interest in the income of the accumulations contingent on her surviving the settlor, now became entitled in possession to that income. There was, therefore, a passing under section 1, the application of which was not excluded by the mere fact that the person who became entitled to the income in possession on the death of the deceased was a person who, before the death, had a contingent interest in that income.

As to aggregation, it was laid down by the Court of Appeal that a test which may properly be applied—though not necessarily the only possible test—is whether, in the event of all the beneficiaries disclaiming the benefits conferred upon them by the disposition, there would be a resulting trust in favour of the deceased or his estate. In *Hodson's Case* the answer would clearly be in the affirmative, and, that being so, it would—it was held—be impossible to say that the property in question was property in which the deceased never had an interest. The adoption of this test disposes of the contention that a settlor cannot be said to have an interest in income arising under the settlement after he has parted with all beneficial interest in the settled property: "the person who planted the tree cannot be said never to have had an interest in its future fruit".

The question of aggregability was decided by the Court of Appeal on the footing that, on the principles already stated, there was a passing under section 1, and not, as Farwell, J., had held, a notional passing under section 2 (1) (d). On the view taken by the Court of Appeal it was unnecessary to consider how the provisions of section 4 of the 1894 Act as to aggregation are to be applied where duty is leviable under section 2 (1) (d), but, without actually expressing a contrary opinion on this point, Luxmoore, L.J., stated that "we must not be understood to agree with the view of Farwell, J.".

## THE LIBRARY.

*Short Forms of Wills adapted to the requirements of the Middle Classes and Farmers.* By Henry Brighouse, Solicitor. Fourth edition, with the Inheritance (Family Provision) Act, 1938, annotated. By B. A. Bicknell, LL.B., Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1938. xi and 136 pp. (10*s.* net.)

This handy little volume covers considerably more ground than did its predecessors. Whereas previous editions were mainly devoted to precedents likely to be useful in the preparation of farmers' wills, the present edition (in four parts) contains the text of the new Inheritance Act with explanatory notes (24 pp.); common form clauses and forms of "beneficial trusts" suitable for inclusion in a will (18 pp.); general precedents for wills of bachelors, spinsters, and married persons (47 pp.); and a dozen precedents for farmers' wills (40 pp.). The annotations of the various clauses of the new Inheritance Act are particularly acute and enlightening; and, besides suggested precedents to justify the exclusion of a "dependant" from the testator's will (pp. 86—89), a method is suggested of defeating the Act entirely (p. 23). Such questions as whether one should assume that the Act assists only persons who are "dependant" at the date of the testator's death (pp. 5, 20), and what is the precise effect of section 4 (1) (b)—see p. 20—cannot be answered with complete confidence, perhaps, until the Courts have construed the Act: meanwhile we are given due warning that these doubts exist. The forms and precedents are well chosen. Each has an explanatory heading to indicate its general purpose; and, although the relevant points of law are seldom mentioned, such omissions secure economy of space without sensibly diminishing the value of the forms to an experienced practitioner. In view of the wording of section 33 of the Trustee Act it may be wise, perhaps, when directing that income be held upon "protective trusts", to state expressly the period required: in Form 11 (headed "beneficial trusts", but not indexed—pp. 84—85) rather clearer indications of the periods for which three such directions are intended to operate might therefore have been preferable. That the reviewer raises so small a point indicates his appreciation of the work as a whole. The precedents supplied are designed for the client of small means who does not desire an unduly long or complicated will, and they appear to be admirably adapted for this purpose.

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## BOOKS RECEIVED.

*Executorships and Trusts.* By J. H. Phillips and G. E. M. Jenkins, LL.B. London: Sir Isaac Pitman & Sons, Ltd. 1938. xxii and 381 pp. (15*s.* net.) A textbook designed primarily for students taking certain examinations of the Institute of Bankers, and written from the point of view of the Trust Corporation.

*Schedule "A" Tax: Its Assessment and Collection.* By O. L. Forbes, F.C.A. London: Gee & Co., Ltd. 1939. 88 pp. (5*s.* net.)